PRE-EMPLOYMENT DRUG TESTING PROGRAM OF THE U.S. POSTAL SERVICE

HEARING

BEFORE THE

SUBCOMMITTEE ON
POSTAL PERSONNEL AND MODERNIZATION

OF THE

COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES

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WEDNESDAY, APRIL 12, 1989

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON POSTAL
PERSONNEL AND MODERNIZATION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 311, Cannon House Office Building, Hon. Frank McCloskey (chairman of the subcommittee) presiding.

Mr. MCCLOSKEY. Good morning. This hearing of the Subcommittee on Postal Personnel and Modernization will come to order.

Today the committee will be examining what compelling interest the U.S. Postal Service has to justify abandoning an individual's constitutional rights. Recently, the dissenting Supreme Court Justices in *NTEU* v. *Von Raab* questioned what steps can constitutionally be taken to detect drug use. The Supreme Court has agreed that a urinalysis constitutes a search for the purposes of the Fourth Amendment. I concur with conservative Justice Antonin Scalia who stated, "I think it obvious that it is a type of search particularly destructive of privacy and offensive to personal dignity."

In reviewing the Postal Service's testimony and policy, I find no social necessity which justifies the unreasonable searches that the U.S. Postal Service plans to implement nationwide within the next few months. In *Skinner* v. *Railway Labor Executives' Association,* the Supreme Court took special care to establish the existence of the special need for the search and seizure based upon well-known or well-demonstrated evils in the field of railroad transportation with well-known consequences.

The Postal Service has not provided any well-demonstrated reasons or outlined possible consequences for the need of wholesale drug screening of all applicants. Is there any evidence of a real problem that will be solved by urine testing of postal applicants? I do not think so. I have reviewed the preliminary findings from the Postal Service's empirical evaluation of pre-employment testing and have found nothing in the data which justifies the compelling need for drug testing. Drug testing of employees or prospective employees is not a panacea to the drug problem that pervades our country today.

I might say that having talked this morning—for the fourth or fifth time—about this problem with the Postmaster General, there is no doubt in my mind that there are significant to severe prob-

lems of drug usage in the Postal Service. The Postmaster General prefers not to release the figures publicly, and I will respect his confidence and not release them. Needless to say, there is a problem.

Also, my preliminary inquiries and investigation would indicate that there can be a lot more done as far as enforcement, elimination and counseling in the workplace.

As Justice Scalia stated, "The impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search."

Not only is this a Constitutional question, but also a question of collective bargaining rights. Last week, the National Labor Relations Board ruled that the Postal Service's pre-employment drug testing program is an unfair labor practice because the Postal Service did not negotiate the substantial change in working conditions with any of the unions representing its employees. The NLRB's general counsel stated, in effect, that mandatory drug testing was literally a condition of employment. The implications of testing are matters of concern to employees and their representatives. Unfortunately, the Postal Service has refused to bargain with the unions even though one union, the APWU, has requested it. I believe the Postmaster General may be reconsidering that issue now.

Another issue to be considered is whether or not pre-employment drug screening is an adequate predictor of on-the-job performance. According to the Postal Service's own study, two doctors in Boston who have been secretly monitoring new employees who have tested positive for drugs found, "It is clear that substance abuse causes American industry billions of dollars each year. What is not clear is whether pre-employment drug screening provides a sensitive and specific means of identifying future problem employees."

I might say I also question, once it is public knowledge, that the Postal Service does such tests. It would seem to me to ultimately decrease the validity of so testing because, as the word is out there, people will not apply in any sort of a drug-suspect condition.

Dr. Ryan and Dr. Zwerling continued to maintain such concerns when they subsequently noted that of the five employees arrested for drug dealing at work, they had all undergone pre-employment drug screening and had tested negative. Drug tests do not measure impairment; and since there is no conclusive evidence that drug screening can adequately predict on-the-job performance, is it necessary to subject prospective employees to the degradation and embarrassment of drug testing?

Another concern that comes to mind is alcohol abuse. If the Postal Service is determined to fight substance abuse, why not test for alcohol use?

As we all know, a few weeks ago the captain of the Exxon Valdez ran his ship on to a reef and was subsequently and allegedly found to be under the influence of alcohol. His actions have caused hundreds of millions, if not billions, of dollars in long-term environmental and economic damage. It will take years for the environment to recuperate in Alaskan waters. Our international and national economies have been impaired. Clearly, the alleged abuse of

alcohol in this instance has had far more cataclysmic results than could ever occur through drug abuse by a Postal employee.

All of us realize that drug abuse is a widespread problem in our country today, and I do not want to detract from the war on drugs. As I have said, I think the Postal Service can be doing better on enforcement, among other things. As a result of our extreme concern last year, Congress passed an Omnibus Drug Bill; and we now have a drug czar, William Bennett, who is orchestrating the government's commitment to fighting drugs in our nation.

However, I fear that the heaviest casualty in the war on drugs will be an individual's rights and liberties. As Justice Scalia stated in *NTEU* v. *Von Raab,* "What better way to show that the government is serious about its war on drugs than to subject its employees on the front line of the war to this invasion of their privacy and affront to their dignity . . . It is not just the Custom Service employees, whose dignity is thus offended, it is all of us who will ultimately suffer . . ."

Justice William Brandeis observed over 60 years ago, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, wellmeaning but without understanding."

As I said to the Postmaster General this morning, obviously intelligent people of good will can differ on matters such as we are talking about today.

So, with that, why don't we turn to our first witness, Mr. Joel Trosch, Assistant Postmaster General for Employee Relations.

Mr. Trosch, glad to have you here today.

STATEMENT OF JOEL S. TROSCH, ASSISTANT POSTMASTER GENERAL, EMPLOYEE RELATIONS DEPARTMENT, U.S. POSTAL SERVICE

Mr. TROSCH. Good morning, Mr. Chairman. I am Joel Trosch, the Assistant Postmaster General for the Employee Relations Department at the U.S. Postal Service.

I am here today at your invitation to discuss the Postal Service's decision to screen job applicants for drug use, and to report the results of an ongoing study which is confirming the usefulness of the pre-employment drug testing.

The Postal Service has long been concerned with drug abuse in the workplace. The drug epidemic plaguing our nation has not left the Postal Service untouched. We have learned, as many other employers have, that an organization's ability to perform its functions safely and efficiently can be seriously impaired if employees are dependent on illegal drugs.

We have found that about half of the individuals who seek help from the Postal Service's Employee Assistance Program do so because of a drug-related problem, and that criminal activity involving the sale and distribution of illegal drugs in postal facilities is not uncommon.

The cost of illegal drug activity is great. Based on the general estimates of the National Institute of Drug Abuse, we calculate that the monetary cost to the Postal Service may be hundreds of millions of dollars a year.

But there are other potential costs as well. Drug abuse in the Postal Service could undermine the public's trust in the integrity and reliability of the postal system and the sanctity of the mails. That is something we are determined not to let happen.

In order to come to terms with the problem of drug abuse on the job, the Postal Service has formulated a comprehensive drug-free workplace policy. Our applicant drug screening program is a major component. In addition to providing for pre-employment drug tests, this policy emphasizes drug education and awareness, giving individuals a helping hand through our Employee Assistance Program, and the Inspection Service's prevention and criminal investigation activities.

In developing an applicant drug screening program, we were keenly aware of the need to insure that it would embrace only the highest scientific and professional standards. The final program, which took more than a year to develop, was carefully formulated with the aid of Peter Bensinger, who formerly headed the Drug Enforcement Administration.

Last June we awarded a testing contract to Pharmchem Laboratories of Menlo Park, California. We are now well into our implementation phase, having trained personnel in 36 of our largest facilities.

The training of key employees throughout the Postal Service will continue over the next six months. Once the training is completed for a particular facility, actual drug testing of job applicants is initiated consistent with the locally-developed implementation plan that assures site and staff readiness.

To help us evaluate the effectiveness of this drug screening policy, we designed a research project to run concurrently with the implementation of the testing program. Through this study, the only one of its kind in an applied work setting, we are monitoring the job history of 4,375 employees hired in 21 postal facilities to help assess the relationship of an employee's pre-employment drug test results to his or her on-the-job performance.

To assure that the study is objective, local managers at the 21 sites do not have access to the test results of individual employees.

Data gathered during the first six months of the two-year study indicate that employees who tested positive for drug use, 8.4 percent of the study group, were 40 percent more likely to leave the Postal Service involuntarily than those who tested negative.

Those testing positive were also found to have a greater unscheduled leave rate, some 43 percent higher than employees whose test results indicated that they were not using illegal drugs.

Inasmuch as both turnover and absenteeism translate into significant costs for the Postal Service, these interim results provide further support for our decision not to hire applicants who test positive for drug abuse.

Mr. Chairman, that concludes my prepared statement and I would be happy to address any questions that you might have.

Mr. McCloskey. Thank you very much, Mr. Trosch.

You and I had a chance to chat a little bit before the meeting today. As you know and as I indicated in my previous remarks, I had a pretty good conversation this morning with the Postmaster

General and have talked to him on numerous occasions about drug use—and drug sales, I might add—in the workplace.

He used some figures which I feel he does not want publicized right now, and I can understand that as far as opinions or estimates or percentages of on-duty use and effects of drugs in the workplace. Could you, in keeping with loyalty to your organization and the fact that you do work for the Postmaster General, state how severe you consider the problem is?

Mr. TROSCH. Well, Mr. Chairman, reading the newspaper one is very painfully aware of the degree of substance abuse in society in general. The Postal Service draws its applicants from throughout society. We have to believe that there is some relationship between the general population and the population of individuals who apply for opportunities to work for the Postal Service.

But, beyond that, as I mentioned in my statement, some 50 percent of those individuals with the Postal Service, as employees already, who approach our Employee Assistance Program are doing so because of substance abuse.

We have a substantial number, I would say, of Inspection Service activities, interdiction, and arrests and subsequent convictions for dealing on the premises. If you have a seller, you certainly have a buyer.

We are concerned. We think we need to react to that kind of data.

Mr. MCCLOSKEY. There is so much to talk about that I almost do not know where to start, but I'll give it a try.

In talking to the Postmaster General again this morning, he says he is totally opposed to random drug testing in the work force, a work force which he says is substantially to massively infected with a drug problem. Indeed, as you and I can talk in a minute, he indicates that there are severe problems in enforcement— probably known, documented problems, to say the least, in the workplace.

But the Postmaster General expresses no concern at all for the employee coming in. I think that historically and legally, the unions have a right of concern for that prospective employee. As to individuals whose unions don't fight for or cover often, there is something called the Constitution.

Could you comment on why the blitheness with which you accept this substantial invasion of privacy for someone not on board yet, but a real reluctance—and we will talk about this in detail in a moment—to enforce against a known problem in the workplace?

Mr. TROSCH. Mr. Chairman, I think you have raised probably three or four different issues there. The comment of blitheness I think is perhaps a mischaracterization. The Postal Service is certainly concerned, obviously, with its employees.

Mr. MCCLOSKEY. It is not a mischaracterization, but it is a characterization which I am glad to defend. But, anyway, go ahead.

Mr. TROSCH. We are certainly concerned with our employees and we are doing a lot. I do not know whether we are doing enough, but we are certainly doing a lot with respect to assistance of our employees.

With respect to new employees coming into the workplace, I think the issue of whether or not that is an issue for collective bar-

gaining is certainly one that is before the National Labor Relations Board.

Mr. MCCLOSKEY. I think they have decided.

Mr. TROSCH. Mr. Chairman, I would respectfully disagree. I do not think they have decided the case.

Mr. MCCLOSKEY. It is on appeal right now.

Mr. TROSCH. No, sir, it is not. The case was heard by an Administrative Law Judge in January, I believe. Briefs have been submitted but there has been no decision.

Mr. MCCLOSKEY. Well, that is not my information. But, anyway, that does not change the issue. Go ahead.

Mr. TROSCH. So, my point on that, however, is that we believe the matter has been submitted to the appropriate authorities—that is, the National Labor Relations Board —in terms of whether it is in fact an appropriate subject for mandatory collective bargaining.

Mr. MCCLOSKEY. Now, given the significance of this problem, the severity of this problem, is there a drug czar in the Post Office?

Mr. TROSCH. A drug czar? No. I think not.

Mr. MCCLOSKEY. Am I looking at him?

Mr. TROSCH. Well, I have a fair number of responsibilities that relate to employees. The Postal Inspection Service is certainly involved with respect to criminal activity in terms of sales, arrests, and other unlawful conduct.

I am not involved in that aspect of it, but I certainly am involved with respect to the Employee Assistance Program. That comes within my area of responsibility. The whole area of safety and health, the area of selection of employees, and, the drug screening program that we have announced is within that area.

So, I have a lot of the responsibilities with respect to employees generally.

Mr. MCCLOSKEY. We are going to work on this over the months, but it would seem to me from the severity about which the Postmaster General describes these problems, you need someone at a pretty high level in the system working drugs full time. Do you think that is a promising idea or not?

Mr. TROSCH. There are a number of different areas of responsibility. I certainly coordinate a great many of them and I work with the Inspection Service. At least, we are exchanging information so we know—they are aware of our program, they have an understanding of what we are doing. I have information with respect to the arrests they are making.

For example, another point that indicates the kind of severity of the problem. I get a copy of reports on major arrests within the Postal Service by the Inspectors. When the Inspectors arrest individuals for drug dealing, I am certainly aware of those. But we also find a number of instances in which an arrest is made for theft of mails or for what we refer to as internal crimes.

Underneath that, we often find that the cause, the root cause is a substance abuse problem and the individual is in fact doing something in order to support the habit.

So, I am aware of that kind of activity. I coordinate, in fact, all those programs related to employees on substance abuse. Very frankly, those are issues that I deal with top management on.

Mr. McCLOSKEY. The Postmaster General indicates a certain inability or frustration to deal with the concept of probable cause on the job. For example, I was asking him how many forklift truck crashes and glassy-eyed, staggering employees does it take before you grab somebody aside and say, "You need counseling. Will you submit to a drug test," et cetera.

I guess without being absolute, the Postmaster General indicates that it hardly ever, ever gets to that stage. I just question enforcement if someone has two forklift truck accidents, or whatever, a week and they have a certain glassy-eyed detachment—whether it is because of drugs or alcohol.

I mean, is not there some sort of right to take enforcement action to start a probable cause process?

Mr. TROSCH. Well, if there is conduct on the job, whether it is an accident or just walking around in a condition that a supervisor might identify as not being totally in control of one's faculties, the supervisor has the ability to request a fitness for duty physical by a medical officer of the Postal Service.

The medical officer, and only a medical officer, can order a drug test, if the medical officer believes that it is a possible cause of the impairment. Supervisors are not allowed to order a drug test. It is a medical issue.

But there is no standard of the number of accidents or the number of apparently impaired conditions. The supervisors see a situation——

Mr. McCLOSKEY. Yes, but I think you are giving me good news although maybe a little bit in contrast with what the Postmaster General said this morning. You say there is a process, and it is acted on, to refer someone into medical review who may be reasonably suspected of being impaired by drugs or alcohol, or whatever. Is that correct? Do you do this as a matter of course? I hope you do.

Mr. TROSCH. Well, one of the first courses of action generally is to refer the individual to the Employee Assistance Program; a referral to the medical officer for a fitness-for-duty is another alternative, or both may occur.

Mr. McCLOSKEY. How about policy as to drug sales on the job? I think the Postmaster General may be concerned about the backing of prosecutors, U.S. Attorneys, and so forth? I was rather startled to learn that you don't take legal action until the third arrest. I guess there are two free bites, two free on-duty drug sales under current Postal Service policy. You know, to a layman that sounds like soft on drugs to me.

Mr. TROSCH. I am not sure of the underlying information on that, Mr. Chairman. That is a matter for the Inspection Service. I am not so sure that it takes two arrests.

Mr. McCLOSKEY. Three arrests.

Mr. TROSCH. Three arrests. Whatever that number.

Mr. McCLOSKEY. No, wait. Three buys, excuse me, before the first arrest. So you get two free bites of the apple.

Mr. TROSCH. I am just not familiar with the Inspection Service's internal controls.

Mr. McCLOSKEY. Mr. Trosch, don't you think you ought to be, given that you are the top man coordinating all this and you are here today because of these issues?

I am not trying to give you a hard time, but this is supposed to be your expertise.

Mr. TROSCH. As I expressed to you earlier, Mr. Chairman, I am concerned with that type of information and I certainly plan on talking with the Chief Inspector on that particular issue. I do not know whether it is driven by the U.S. Attorney's Office in terms——

Mr. MCCLOSKEY. If Mr. Haggerty wants to join you on some of these questions in speaking for the Postmaster General, it would be fine with me.

What do you do with the first certified drug buy on the job before it gets to three that the Inspection Service comes up with?

Mr. TROSCH. Again, Mr. Chairman, you are into the criminal law enforcement area, and that is one area that is not within my direct responsibility, and I really do not get into all the details of the policy of how many instances and under what circumstances they need to be observed to support an arrest and to support a referral to the U.S. Attorney, who then makes the decision on whether to go forward with prosecution.

It could be a function of experience with the U.S. Attorney's Office that they need a certain amount of evidence.

Mr. MCCLOSKEY. Yes. I guess in fairness to the Postmaster General and the postal system, it would appear that it is possible that part of the problem as to criminal enforcement would be, and with the volume of drug cases hitting U.S. Attorneys offices, that they do not treat it as a priority.

But I think this Committee would like to know (a) if that is the case, (b) can we help on consultations within the law enforcement process, and (c) surely on a documented drug buy on-duty by your Inspection Service there can and should be significant action, i.e., involuntary detachment from the Service. I am not sensing that that is even going on.

I mean, what do you do—maybe I asked this a minute ago and missed your exact reply—but, what do you do when your investigators certify that someone is dealing drugs on duty? Why are we talking about this today if you cannot tell me what happens, Mr. Trosch?

Mr. TROSCH. Mr. Chairman, we discharge an employee who has been arrested and convicted for dealing drugs on Postal Service property.

Mr. MCCLOSKEY. Can you say, to your knowledge, that that is always the case? I mean, it does not strike me as unreasonable. Is that a policy or what you think happens?

Mr. TROSCH. I cannot certify to you, Mr. Chairman, that it happens in every case. I believe that would be the general reaction that you would find from any postal manager in the field who had that type of information reported to him or her by the Inspection Service.

Mr. MCCLOSKEY. Did you have—I would assume and hope you did—did you have a legal review? You know, a legal and constitutional check-off done before initiating your pre-employment drug screening program?

Mr. TROSCH. The pre-employment drug screening program took well over a year to develop, as I commented. There was a team of

Postal Service people working on the development of that, and certainly attorneys were a part of that team. Yes, sir, there were——

Mr. McCLOSKEY. Well, could I ask, for the record, if you would submit to the Committee any legal or constitutional opinions? Again, just for our information. Is there a written advisory opinion on it?

See, I am wondering how they got to that when so far Supreme Court decisions have not held for massive without probable cause pre-employment drug testing in the public force.

Mr. TROSCH. Well, sir——

Mr. McCLOSKEY. I am just wondering. There has been drug testing allowed for very specific national security and safety situations. Who knows how it will ultimately develop. We do not know. But you heard the concerns of Justice Scalia.

Is there a written statement that your process is Constitutional? I would just like to see the logic and the citations on it. It would help me. Maybe we missed something.

Mr. TROSCH. All right. Certainly the Supreme Court had not spoken to the issue of drug testing until very recently, and the development of this activity was commenced over two years ago, I believe. I'll have to go back through our files to see what written opinions may exist.

Mr. McCLOSKEY. I would appreciate it.

Mr. TROSCH. But the attorneys were part of the team and were part of the development. So, as individuals steps in the process were being considered, the attorneys were right there as part of the consideration and cautioning, "You'd better not do it that way because that could create some difficulties."

Mr. McCLOSKEY. Describe the drug testing process for me that these applicants have been going through. Those who did not go through it, of course, did not get the job. A little possible constitutional problem that we could all think about in the long-run. They were, as you know, separated from the process immediately. You went through the urinalysis or you could not apply, in effect.

Tell me what happens. How do they do those tests?

Mr. TROSCH. Well, when an individual is called in for the pre-employment processing, interviewing and a number of other steps that occur, while the Postal Service is making up its mind as to whether an individual is suitable for a Postal employment and should be employed, the individual is notified at that time—at the time of the call-in—that part of our pre-employment process is a substance abuse test.

When the individual comes in for that type of processing, medical personnel—and medical personnel only—for the Postal Service, become involved in collecting the urine sample for transmission to the laboratory.

Mr. McCLOSKEY. Okay. Let us drop the euphemisms here. How do we become involved? Tell me what goes on.

Mr. TROSCH. Sure. The applicant is directed to essentially the medical unit. The individuals in the medical unit again are advising an individual that it is a urine collection process for a substance abuse test. There is a waiver signed by the individual.

The next step in the process, the individual's outer garments are taken—a coat, or something of that nature. They are directed to a bathroom.

Mr. McCLOSKEY. Wait a minute. Let us run that reel backward for a second. What about the outer garments?

Mr. TROSCH. Outer garments. Coats. You know, something of that nature where perhaps an adulterating agent could be stored in the pocket or——

Mr. McCLOSKEY. So, he has got his shirt and pants on or not?

Mr. TROSCH. Yes. Of course.

Mr. McCLOSKEY. Okay. Go ahead.

Mr. TROSCH. The individual is directed to a bathroom, given a collection container; directed to wash his or her hands and give the sample, not observed. There is no one observing at that point.

The individual brings the sample out to the medical personnel again. The medical personnel——

Mr. McCLOSKEY. Okay. I am sorry.

Mr. TROSCH. Sure. Stop me when——

Mr. McCLOSKEY. Okay. We are getting to the big point here now. They are sent off to do the sample placement, right?

Mr. TROSCH. That is correct.

Mr. McCLOSKEY. Now, where do they go and who is with them at that point?

Mr. TROSCH. Well, they are taken to a bathroom by a member of the medical staff at that facility. As I said, they are directed to wash their hands. They are then directed to give the sample in the bathroom. There is not someone observing at that point.

Mr. McCLOSKEY. There is no one looking at them? They have that last iota of privacy? They can do it without being observed? I guess our government has a mixed policy on that.

In the military, there was a separation recently involving a case where an outstanding woman officer was ordered to be observed. Understandably, that bothered her sense of dignity and privacy and she is no longer with the military.

But they are allowed to go off by themselves then, right?

Mr. TROSCH. Absolutely.

Mr. McCLOSKEY. Well, that is interesting. Go ahead.

Mr. TROSCH. When the individual brings the sample back to the medical personnel, there are verification forms. The sample is sealed. Essentially a whole chain of custody starts at that point, with a seal, the individual recognizing the number on the seal, signing a document saying that the seal number corresponds with their name and the information they have provided. Then the medical personnel ship that to the laboratory for testing.

I forgot to mention one point. In the release document individuals are asked to identify any prescription drugs that they may be using which might have an impact on how the test results might come out.

Mr. McCLOSKEY. I guess that has been referred to in some of the literature as another reason for, I think, not unreasonable concerns for privacy.

As to privacy, this test will tell any and all prescription drugs that an individual is using, quite possibly related information from that; such as, whether or not a woman is pregnant, et cetera.

I think it does raise an understandable privacy concern. But, anyway, Mr. Trosch, please go ahead.

Mr. TROSCH. Mr. Chairman, the information that is gathered is maintained securely by medical personnel. It is not released to anybody else in the organization.

Mr. MCCLOSKEY. Yes. Do you want to proceed further in the process or have we covered it?

Mr. TROSCH. Well, the samples are sent to the Pharmchem lab in Menlo Park, California, and they conduct the testing at that point.

I think, as we have described to you in responses to questions that you asked last summer, it is a two-step process in terms of the testing. There is an EMIT test and then if that shows positive, there is the GCMS test which is of a different nature and consistent, by the way, with NIDA and HHS standards in terms of drug testing.

Only a positive result from the GCMS test is referred back to the medical people at the Post Office which submitted the sample itself.

Mr. MCCLOSKEY. I am not going to dwell on this because of technical aspects and differing expert opinions; but, as you know, there is a problem of false positives. Do you want to comment on that as far as your opinion of any numerical incidence of possible false positives, or do you think we have a totally accurate program for the Postal Service?

Mr. TROSCH. Our laboratory reports zero false positives in its urine testing activities.

Mr. MCCLOSKEY. I guess your own statistics submitted to us say 99 percent accurate.

Mr. TROSCH. No. I think we say 99 percent accuracy in terms of identifying something which is positive. The lab has not identified false positives. It may not identify everything that should be identified positive, but it does not work the other way. It is 99 percent accurate going the other way.

Mr. MCCLOSKEY. Yes. Well, we can pursue this further and ask you further questions for the record and have other discussions, but, as you know, in the field there are, I think, legitimate concerns as to false positives.

A further question, maybe a soft question, I am sure I am going to get an expected response. Mr. Trosch, do you think it is unreasonable that someone, a totally honest, blemish-free, virtuous person who would never even think of going near a marijuana joint or a bottle of beer, has a problem with showing up at the Post Office, applying for a job, and given all the standards of personal dignity and constitutional rights in this society in order to get a job, the price of your employment has to be people following you around with this bottle or jar, or whatever, and please go over there. And then they run this through a test.

I mean, is it unreasonable that—I am sure a certain number of people said or maybe your report shows it—"I am not going to do this," even given no problem or history with drugs or any other problematic behavior?

Mr. TROSCH. I guess there are two or three issues in there, Mr. Chairman.

It's obviously difficult to figure out which individuals are in that category that you have described just by reading their application. But, more importantly, we recognize that this is an emotional issue. We recognize that people have concerns.

What we have done in constructing this program is attempt to balance interests. We have attempted to balance these interests as fairly as we can.

You commented a moment ago on the notion of whether we observe the individual giving the sample. We do not. That is a balancing consideration. We may, by not doing that, have some people who take advantage of the process. But we have created a system which we believe minimizes the legal risks and wherever we thought there was a reasonable option to take in favor of the applicant, we did so.

Mr. McCloskey. I asked this question before, but obviously you and the Postmaster General have no problem at all and think everything is peachy keen with pre-employment drug screening. But Postmaster General Frank, at least from what I detect today and have detected before, has an aversion to random drug testing.

Why the embracing of one and the aversion to another? Particularly, I think he could make the argument that certain postal positions involving safety and security would be more amenable to a description of a reasonable seizure than, say, mail handler or letter carrier?

Mr. Trosch. Well, the random testing, as you observed, is really, I think, in reference to our own employees. We have our employees before us all the time. We are able to look at their conduct. We are able to consider how they are performing on the job. And we are able to react to that type of information.

In those circumstances where it is possible that some sort of impairment is adversely affecting that activity, we have the ability, as I said, to either refer for a fitness for duty physical or refer the individual to the Employee Assistance Program.

We do not know our applicants. Our applicants are coming in—the first time we see them might be at the entrance examination, but the people who administer the exam are not those making the decision. So, testing applicants, where we have no on-site opportunity to observe their behavior, to observe their conduct in the workplace setting, what we are looking for is essentially an alternative to that observation.

With respect to employees, we have the ability to observe. With respect to applicants, we do not.

When I say observe, I am not talking about just looking at the individual. We have our employees working there eight hours a day. We are able to determine whether or not the conduct is such that there might be a problem. We have other ways to deal with those problems. We do not really need to use a random drug test at that point.

Mr. McCloskey. In essence, it is easier to violate the privacy of strangers than your fellow workers? Is that a psychological comfort with this?

Mr. Trosch. I think there are alternatives to drug testing, certainly on a random basis, for our own employees than as opposed to the situation we find ourselves in with applicants.

Mr. McCLOSKEY. I would suggest, in talking to you and the Postmaster General, that you ought to investigate more stringent enforcement of on-duty probable cause. It just seems with the people they have on the force now—I do not want to use the figures the Postmaster General is using—but they are, let us just say, significant to massive incidences of on-duty drug use and abuse.

I would just suggest—and I will talk about this with the Postmaster General—that you really look to enforcement and implementation of your problem for people who are there now. The other night I read your report and the statistical survey which, quite frankly, I had mixed feelings about. When I was more of an academic, I was more gifted at deciphering something like that, but I do have a bias against documents that are difficult to understand.

But one of the things I got out of the report, and I believe some of your statements, is that is it not true that 90.5 percent of the people who did not test positive, who were in essence drug-free when they came in, made the probationary period fine, right? So you had problems with 9.5 percent. Is that right?

Mr. TROSCH. I believe that is the correct figure, Mr. Chairman.

Mr. McCLOSKEY. Okay. And then as to those who tested positive and came on, 86.7 percent adequately survived the probationary period, right?

Mr. TROSCH. I believe again that is the correct figure.

Mr. McCLOSKEY. And 13.3 percent did not. You have a 3.8 percent difference. Of those who did not make it—certain parts of that study would be difficult to digest in one reading—were there follow-ups, or can you make statements as to how many of the people who did not make it were in essence drug-related?

You know, people can do statistics and there are good studies and mediocre studies and bad studies. But, how about the people who did not test positive for drugs, who used drugs, and did or did not have a problem afterward and those who tested positive for drugs who are not using drugs after they were on service with you? Do you have breakdowns of how many of the people who did not make it you judged to be drug-impaired?

I know that is a complex result to ascertain, but we are looking to attributing a problem here to drug use. You have a statistically significant difference here. But given everything involved and all the possible variables, it doesn't seem to be that much of a difference. You know, 86 percent versus 90 percent. You have got a B-plus versus a low A.

Mr. TROSCH. Well, of course, that is not the kind of sale you use. That study is perfectly consistent with the type of analysis that the EEOC Uniform Guidelines requires. What one is looking for is linking a selection device and the results and use of that selection device as a predictor of success on the job.

What we have done in that study, or what the study has resulted in, is a showing that there is a significant difference between those individuals who test positive and those who test negative in two different areas. One, involuntary termination and, two, attendance. That information——

Mr. McCLOSKEY. The attendance rates are interesting, from what you and the Postmaster General say.

Mr. TROSCH. Yes. There is a 43 percent, I believe, greater unanticipated absence—unscheduled absence—with those individuals who tested positive at the time of employment, as opposed to those who tested negative.

That is precisely the kind of study that the Uniform Guidelines contemplate. That is precisely the kind of study that a court, quite frankly, would be evaluating as it considers a selection process.

Mr. MCCLOSKEY. This hearing is probably going to get a little bit of publicity, right? I mean, there is going to be something somewhere out there in the general circulation that we have had this hearing and that the Postal Service has this policy. And there are other stories coming from all sorts of sources nationally.

Mr. TROSCH. There have already been a number of newspaper articles.

Mr. MCCLOSKEY. Now, the people that were coming in for your study in these 11 centers, and so forth, probably most of them were relatively surprised that they were going to have a drug test, right?

Mr. TROSCH. We advise people when they come in that they are——

Mr. MCCLOSKEY. Oh, I know that. But, given the state of the information and the dynamics of your innovation, you could suspect that most of them really did not know it was Postal Service policy to have a drug test, right?

Mr. TROSCH. Well, as I said, we advise the people that——

Mr. MCCLOSKEY. No, wait. I know you told them. That is not what I am saying. But when they said, "Hey, I am going to go down to the Post Office and get a job," they didn't say, "Hey, I'm going to go down to the Post Office and go in the bottle," did they? For most of them that was new information. I mean, when you told them.

Mr. TROSCH. Oh, yes. I presume that is the case. Yes, when we told them, that may well have been the first time they learned that that was part of the selection process.

Mr. MCCLOSKEY. What is going to be the state of the art in six months as far as applicants reading the paper and people talking on the streets and the coffee shops? What are they going to need to know if they want to get a job at the Post Office?

Mr. TROSCH. I would suspect that perhaps there will be a fair amount of knowledge in the community that if you are a substance abuser, you ought not to apply for postal employment.

Mr. MCCLOSKEY. Or you ought to go cold turkey or clean, or whatever, for three months or six months, right? And you go down there and you pass that test. And then your numbers drop to one percent or less. Now, don't they? And then you are going to have a resurgence of the drug problem after they are on the job and through their probationary period.

Is this not a likely scenario?

Mr. TROSCH. If people are in fact able to go cold turkey for an extended period of time, that is——

Mr. MCCLOSKEY. I think some of them can on some substances. I am sure.

Mr. TROSCH. That is a possible scenario.

Mr. MCCLOSKEY. I think it is a quite likely scenario. You are not going to go down there with drugs in your system regardless of

your past practices or your future plans for drug use. So, in essence the system is hitting at a very marginal, minimal aspect of the problem.

Mr. TROSCH. Well, I would disagree. Mr. Chairman, I think there will be a deterrent effect. There will be individuals who will not be able to remain drug-free sufficiently to pass the test. I think some people will not come in. I think we will still get people who will come in thinking that they can beat the test, so to speak.

Mr. MCCLOSKEY. Oh, I am sure.

Mr. TROSCH. And I think we will be able to identify those individuals.

Will there be people who will be able to beat the system by remaining drug-free for three months? Yes, sir, I am sure there might be. I am sure there will be. What we are trying to do is take a reasonable step in screening out those individuals who are substance abusers.

Are we going to identify everybody? No, sir. It might be nice if we could, but we recognize we cannot. I think we would have to take far more stringent measures, which on balance we would choose not to take.

Mr. MCCLOSKEY. I do not want to slam it into the ground. We do not disagree that much. But if we talk in a year and you do implement this thing—which I guess you plan to do—I would say you will come back and tell me that one percent are showing positive in these tests and that a certain percentage—after they get through the probationary period, assuming no other measures or improvements in the Postal Service or in society—of your rates of on- and off-duty drug use are going to be close to what they are now if you do not take any other enforcement, investigative, prosecutorial, or counseling measures.

Mr. TROSCH. We would certainly hope to see improvement in the situation given our comprehensive program. Not just one aspect of it.

Mr. MCCLOSKEY. How about a different thing legally—as far as functional impairment on a substantially identical issue—how about alcohol? A study I read the other night said one marijuana cigarette would equal a certain discernible impairment.

Do you know how many Heinekens or scotches would translate into one marijuana cigarette? I do not know, but I guess I could find that out.

Mr. TROSCH. No, sir, I do not know offhand. Alcoholism and alcohol abuse is certainly a substantial problem in society in general and I think in the Postal Service as well because we are part of society.

The difficulty with testing, however, for alcohol abuse is the metabolism rate. You can metabolize the alcohol a lot faster than you do the other illegal substances—or, I should say illegal substances—alcohol is not illegal per se.

Mr. MCCLOSKEY. Yes.

Mr. TROSCH. The ability to have a reasonable test is far diminished because in 12 hours, or perhaps less, an individual is no longer going to be impaired unless there is a real substantial intake.

Mr. MCCLOSKEY. Well, I think we all know that——

Mr. TROSCH. The captain of the ship notwithstanding.

Mr. MCCLOSKEY. We all know the legal and social and ethical similarities and paradoxes as to alcohol and drug use. But I guess it is just the idea that a person could get into a lot more trouble from one marijuana cigarette on Saturday night on a weekend than he can for drinking ten Heinekens a night seven nights a week and being a dullard on the job. Maybe he can function, or maybe he is impaired and maybe he is not, for whatever his job is.

But that is, I think the Postmaster General would agree, an equal or greater problem. The Postmaster General says a greater problem, and I just hope you are working on that.

Mr. TROSCH. Absolutely. Our Employee Assistance Program originated many years ago as an alcohol recovery program. It has been expanded in recent years to deal with substance abuse.

Half of the individuals who are in our Employee Assistance Program are there for alcohol abuse problems. We work very definitely with them.

It is a concern. We just do not believe that it is a concern that we can address effectively through a testing program. It is just a different type of situation.

Mr. MCCLOSKEY. Thank you, Mr. Trosch. You have done a good job here today. I would like to talk to you and the Postmaster General again, and I would particularly like to pursue the issue of enforcement and the U.S. Attorneys cooperation with the Postal Service.

I have said some of this already, but it would seem to me that three drug buys on the job before legal action is taken is a bit much. I would just say that if it is a problem with the U.S. Attorney, we ought to pursue it.

At any rate, there should be no problem with punitive sanctions from the Postal Service as to their jobs. And I will tell any union, any union employee or official, at any level who wants to defend an employee who is caught dealing drugs on the job when they want to fire him for the first certified drug dealing offense, I would tell them to get lost.

So, what I am saying is I do not want to hear from the Postal Service that you cannot deal effective against drug dealers because it is a union hassle or too much paperwork, or anything like that, because it is just not going to fly.

Mr. TROSCH. Thank you, Mr. Chairman. I will share those concerns with the Inspection Service and top management.

Mr. MCCLOSKEY. Thank you.

[The following letters were received for the record, subsequent to the hearing.]

ONE HUNDRED FIRST CONGRESS

FRANK McCLOSKEY, INDIANA, CHAIRMAN
THOMAS C. SAWYER, OHIO
RON DE LUGO, VIRGIN ISLANDS
DON YOUNG, ALASKA
JOHN T. MYERS, INDIANA

U.S. House of Representatives
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SUBCOMMITTEE ON POSTAL PERSONNEL AND MODERNIZATION
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May 5, 1989

Mr. Anthony M. Frank
Postmaster General
U.S. Postal Service
Washington, D.C. 20260

Dear Tony:

I am writing this letter as a follow up to the April 12, hearing on the Postal Service's pre-employment drug testing plans.

As I stated at the hearing, I would like to read the Postal Service's legal review which was conducted prior to the implementation of pre-employment drug screening and the legal advisory opinions regarding the constitutionality of pre-employment drug screening by the Postal Service. In light of the Supreme Court's recent rulings on drug testing, I also want an opinion from your attorneys regarding these rulings and your program. I would also appreciate comments from your legal department concerning the allegation that the Rehabilitation Act of 1973 requires the hiring of drug abusers.

One of the items that came up during the hearing in my conversations with the unions is the need for a meeting with postal management regarding drug abuse counseling, enforcement, fairness, and the EAP program's effectiveness. I want to have such a meeting with management and any postal union heads who want to participate concerning these issues as soon as it can be arranged.

After listening to the testimony regarding the Employee Assistance Program (EAP), I have serious concerns about its effectiveness and the way in which it is being administered. I would appreciate it, if you would have your human resources department review the program and provide me with a report on your findings. It is possible that I may schedule a hearing on the EAP program, if I continue to hear negative comments from the field.

I am very concerned about the requirements the Inspection Service must meet in order to get the U.S. Attorney's Office cooperation. I would like to get a report from the Inspection Service on what can be done to assist them in their efforts to stop drug abuse

and sales in the workplace.

I am attaching a number of questions for the record. Please respond by June 2.

I want to know how many applicants have been denied employment with the Postal Service because of a positive drug test since you began pre-employment drug screening. This information will not be included in the hearing record.

Thank you for your cooperation in these matters. I look forward to hearing from you in the near future.

Sincerely,

Frank McCloskey,
Chairman

FM/dk
Enclosure

Questions from Chairman Frank McCloskey

What is the Postal Service's policy with regard to employees who are arrested and convicted for selling drugs? What does the Postal Inspection Service require in order to arrest an employee for selling drugs? What is the policy for employees who are caught using drugs on postal property?

The Postmaster General has stated that drug abuse is a significant problem within the Postal Service in certain urban areas. Why not appoint a management person (postal drug czar) to deal with the problems of drugs and alcohol abuse within the Postal Service, including oversight of the EAP program?

I believe to have a truly effective program, the Postal Service should try its hardest to locate the EAP offices in a private area away from the workroom floor. Why are the EAP offices in some post offices in prominent view of the workers? What procedures are followed to ensure the anonymity of employees who participate in the program?

How often has the Postal Service conducted quality control checks on Pharm Chem since pre-employment drug screening has begun? Please list the details of these quality control checks.

Please list the cities where pre-employment testing is currently in place and outline the time frame as to when the program will be implemented nationwide.

Observations and Questions on An Empirical Evaluation of Preemployment Drug Testing in the United States Postal Service: Interim Report of Findings from Chairman Frank McCloskey

The following sections consist of observations and discussion about various aspects of the study. When possible, questions relevant to these observations are provided. Questions addressing the more technical details of the study's design and analyses are not included. Page numbers appearing in parentheses refer to the relevant pages in the report.

I.

Can the results of the study be generalized to the population of new hires?

The interim study estimates roughly $4 million in cost savings by extrapolating from the results of the study. The assumption in this analysis is that if all new hires were screened for drugs, the proportion testing positive would be the same as that found in the study (pg. 42). The study does not discuss circumstances where using this data to extrapolate to the population of new hires should be qualified.

For example, the study states that the subjects in the study did not markedly differ from the U.S. Postal Service population of new hires except that it had a greater percentage of Blacks and a slightly lower proportion of new hires over the age of 40 (pg. 12).

This study sample does differ from the population of new hires. Blacks are represented in the sample group at a 67% higher rate (From Table 2, pg. 13, [32.5-19.4/19.4=67%]) than they are in the population of new hires. The "Other" group is represented at a 32% higher rate in the sample than they are in the population of new hires. Whites, on the other hand, are represented at a 25% lower rate in the sample than they are in the population of new hires. Older employees, 41 and older, are represented at a 20% lower rate in the sample than they are in the population of new hires.

As the study notes (pg. 12) the sample sites were concentrated in large urban areas. Such differences should raise the issue of whether or not the findings of this study -- and the resulting cost savings estimates -- can be generalized to the whole population of new hires.

On a related issue, the study does not report what proportion of the sample came from each of the 21 sites. It may be that a few sites account for a major portion of the sample population. For

example, what if Oakland, Los Angeles, and Chicago provided the majority of applicants in the study? Can and should the results from three cities be used to extrapolate to the Post Office nationwide?

It might also be useful to know what portion of the group testing positive came from each of the sites. If a major portion of the applicants testing positive are located at only a few sites, (e.g., cities that have a more severe drug problem) then generalizing the study's findings to sites that are not similar to these locales is questionable.

II.

The interim study describes a quality control evaluation performed to check on the accuracy of labs performing the urine tests (pg. 16-17). The results of this evaluation are used to support the statement that it would be extremely unlikely to have an applicant erroneously test positive who would have performed satisfactorily if hired (pg. 48).

Is this statement supported by the quality control evaluation results?

False positives occur very rarely using the test procedures described in the study; however, the Post Office quality control evaluation would not be considered as sensitive at detecting false positives as one that followed the National Institute of Drug Abuse's Mandatory Guidelines for Federal Workplace Drug Testing.

Is the quality control evaluation reported in the study different from the NIDA guidelines?

According to the report, 250 samples were sent out to assess lab performance. Sixty percent of the samples were designed to detect the presence of false positives, (i.e., the samples were blank or contained a substance -- referred to as cross-reactive agents -- that might be misidentified as an illicit drug). The NIDA guidelines require that 80% of the blind performance test samples be blank in order to detect false positives. In addition, for the number of tests the Post Office was performing, the NIDA guidelines would require 250 samples per quarter. For the 8 month period covered by the study, 500 samples should have been sent to the lab if the study were following the NIDA guidelines. In brief, the Post Office study's quality control evaluation does not test for the occurrence of false positives to the extent required by NIDA guidelines.

III.

The report estimates a yearly total cost savings of approximately $4 million dollars if all job applicants were screened for drugs. It also notes other potential cost savings that were not included in the analysis (pp. 39-42). The report does not include a discussion of the costs associated with implementing such a testing program.

What is the estimated cost of implementing the drug testing program?

Assuming that the only additional expense is the cost of the test itself, and using the Office of Management and Budget's guidance to agencies in estimating drug program costs, the figure would be:

69,761 tests (From Table 16) x $25 dollars per test (OMB guidance) = $1.75 million.

The estimated savings should probably reduced by this amount. Assuming that all these figures hold up, for each of the roughly 70,000 applicants who would be tested, the Post Office would save $34-$35 after subtracting the cost of the test:

FROM TABLE 16 (pg. 42)

$4,159,259 / 69,761 = $59.62 saved per person tested

$59.62 - $25(test cost) = $34.62

IV.

How similar are the demographics between the group that tested positive and the group that tested negative?

While the study reports on the relationship of the study sample to the population of new hires (Table 2, pg. 13), descriptive information on the characteristics of those new hires who tested positive versus those who tested negative was not presented. Therefore, it is not known whether the drug positives can be validly compared to the drug negatives. If the groups were initially dissimilar on characteristics which affect employee absenteeism and turnover (e.g., age, race, sex, marital status, smoking, etc.) then the observed results could be attributable to pre-existing differences other than, or in addition to, drug use.

For example, if the drug positive group contained a larger number of divorced women with children, the higher rate of absenteeism in this group could also be related to child rearing activities.

V.

Whether or not the initial findings of the study hold up will be resolved as the study group is monitored over time and additional measures of job performance are added to the analysis. Certain aspects of the analyses on absenteeism reported in the interim study could be potential areas of concern.

Were other analyses of leave performed? If so, what were the results?

Absenteeism was quantified by computing an absenteeism rate (pg. 22) that combined sick leave, leave without pay (LWOP) and absent without leave (AWOL). These different types of leave occur under different circumstances. There is no discussion of why these types of leave were combined. No separate analyses are reported for each type of leave, or combinations such as AWOL with LWOP, sick with LWOP. Why not? Why were no analyses performed on annual leave? Why not add annual leave into the analysis? It could be argued that drug users would use up their earned leave first before using sick leave, LWOP, etc.

Are there plans to obtain the missing absenteeism data and perform this analysis again?

The analysis of absenteeism shows a statistically significant difference between the positive and the negative test groups with the positive group taking more leave. The report does not qualify this finding by pointing out that the analysis is not based on the full sample (Table 6) since absentee records were not available for some of the study participants (see pg. 11).

What should be noted is that the size of the negative test group dropped by 32% (pg. 30, Table 6 and pg. 32, Table 7) from the full sample while the size of the positive test group only shrunk by 24%. If there is a tendency for drug users to use more leave, the degree or magnitude of that tendency could be exaggerated by the differential loss of data from the two groups. Considering the fact that the cocaine positive group showed the least loss of sample size -- 16% -- and the study's finding that cocaine users are most likely to be heavy leave users, it may be that the worst leave offenders were included in the positive group while the

absenteeism rate for almost a third of the negative group remains unknown. Analyses which incorporate the missing data, or analyses performed later in the course of the study should resolve this concern.

What was the median absence rate for employees who tested positive and for employees who tested negative?

The mean absence rate for employees who tested positive was 4.35% and 3.00% for those who tested negative for drugs (pg. 31). Since the study suggests that some of the employees who tested positive for cocaine were especially high in their use of leave, it might be informative to know what the median absence rate is for the two groups. Especially high rates--known as outliers--can pull up an average value. The median value is less influenced by extreme values.

Observation on nomenclature: For analytical reasons, the absenteeism rate of each study participant was categorized as "moderate" if it fell at or below 3% and "heavy" if it was above 3%. As discussed in the report (pg. 25) the choice of 3% is based on the fact that the Post Office's annual sick leave rate has averaged around 3%. It should be noted that "moderate" absenteeism indicated a rate of absenteeism at or below the Post Office average for its employees. "Heavy" absenteeism denotes a rate above the Post Office average. Considering how an average is computed, it is likely that a sizable minority of Postal employees would have to be considered as having a "heavy" absenteeism rate.

VI.

A significant portion of the report's discussion section is devoted to citing several circumstances to suggest that the relationship between drug test results and job performance indicators could be even stronger than that found in the study (pp. 46-50). There is also the expressed belief that the relationship between testing positive and absenteeism will increase in magnitude as the study progresses (pg. IV).

The study, however, does not discuss any circumstances where the relationship between testing positive and performance indicators might not be as strong as that found in the study. Alternative hypotheses are notably lacking.

The series of questions that follow explores the basis for one of the assertions that appears in the discussion section of the study.

What is the basis for asserting that if cutoff levels for determining whether a urine sample is drug positive were lowered, the prevalence rate of positive samples would increase and affect the magnitude of the observed relationships upward (pp. 49-50)?

How do you know that the relationship would hold up? Have the authors of the study performed an analysis on those applicants who were categorized as negative because the drugs in their urine were below the cutoff levels for inclusion in the positive group?

If cutoff levels were lowered, would we be more likely to detect infrequent users of drugs? If so, would these users show the same pattern of behavior on job performance indicators as the group reported as positive in the study? Or, would this group be more like new hires who tested negative?

VII.

The study reports that the main question of interest is whether or not drug test results are a viable predictor of the two outcome measures being investigated: turnover and absenteeism (pg. 28). The results indicate that, statistically, the drug test has predictive value and reduces employment error. The study then goes on to estimate the potential savings to the Post Office by adopting drug testing as a screening device and not hiring persons who test positive.

What the study does not address, however, is the point that error is reduced, not eliminated, and that the potential for errors of another kind exist if the policy is adopted -- a larger number of otherwise acceptable applicants will not be hired.

Assuming that the preliminary results remain essentially the same in subsequent reports, the results suggest that 77% (Table 14, pg. 36) of the applicants who test positive would not separate from the Post Office and 70% (Table 7, pg. 32) would have an absenteeism rate at or below the Post Office targeted annual rate of 3%. These applicants, however, would not be hired. Instead, applicants with a negative drug test would be selected. With this group of applicants, 78% (Table 14, pg. 36) would not separate from the Post Office and 78% (Table 7, pg. 32) would have an absenteeism rate at or below the Post Office targeted annual rate of 3%. In both groups, the majority of employees appear to perform at satisfactory levels.

THE POSTMASTER GENERAL
Washington, DC 20260-0010

June 14, 1989

Honorable Frank McCloskey
Chairman, Subcommittee on Postal
Personnel and Modernization
Committee on Post Office and
Civil Service
House of Representatives
Washington, D.C. 20515-6250

Dear Congressman McCloskey:

This responds to your May 5 letter, following up on the April 12 hearing of your Subcommittee on the Postal Service's preemployment drug testing program.

Postal Service General Counsel Louis A. Cox will meet with you directly to discuss the issues of legal concern raised at the hearing and in your May 5 letter.

With respect to your comments concerning the Postal Service's Employee Assistance Program (EAP), we have discussed the issues raised by the unions at the April 12 hearing with those unions (and with other unions representing postal employees) both prior to and subsequent to the hearing. We are exploring solutions to those and other EAP related issues, as well as alternative methods of providing counseling assistance to our employees. We have invited representatives of the unions to join headquarters and field EAP employees in a two-day meeting on these subjects. As these discussions will continue in the framework of the collective bargaining and consultative processes, we suggest that a meeting such as you described is not needed. We will provide you with a review of the operation of the program.

In response to your concerns about what assistance the Inspection Service may need to combat drug abuse and sales in the work force, the Anti-Drug Abuse Act of 1988 provided increased enforcement authority to the Inspection Service pursuant to a Memorandum of Understanding between the Postmaster General and the Attorney General. We are confident that this authority will adequately address our enforcement demands and, therefore, additional Congressional assistance at this time is not needed.

In addition to posing two sets of questions for the record, the answers to which are enclosed, you asked how many applicants have been denied employment because of a positive drug test. As our testimony indicated, we are conducting the applicant drug screening at an early stage of the preemployment process, as one of several suitability screens, including criminal history, driving record and employment history. From the implementation of the drug screening program through the end of April 1989, our laboratory has conducted 7,528 drug tests, of which 646 were reported as "positive." Since our procedures provide that our medical officers review the "positive" results and compare the information with the applicant's list of prescription drug use, some of these "positives" will be considered "qualified" for employment consideration. Due to the nature of the hiring process, as well as the applicant's opportunity to resolve positive findings, we do not have actual numbers of employment denials based on the drug test results.

If I may be of further assistance, please let me know.

Sincerely,

Anthony M. Frank

Anthony M. Frank

Enclosures

Enclosure I

— Questions from Chairman Frank McCloskey

Question 1: What is the Postal Service policy with regard to employees who are arrested and convicted for selling drugs? What does the Postal Inspection Service require in order to arrest an employee for selling drugs? What is the policy for employees who are caught using drugs on postal property?

Answer: A removal action will be initiated against Postal Service employees who are convicted of selling drugs. In the several procedures employees have available to them to challenge such an action, a particularly important factor the adjudicator will consider is the nexus between conviction and the employment relationships if the conviction is for selling drugs off duty.

There is no Inspection Service policy at the present time which requires a specific number of "buys" in order to arrest an employee for selling drugs. Additionally, there is no known policy within the Department of Justice which requires a certain number of buys prior to prosecutive action being initiated by the U.S. Attorney's Office. The number of buys made in a case prior to an arrest can vary. However, past experience has shown that generally three buys are made prior to an employee being arrested. The decision as to the number of buys remains with the investigating Inspector. Making more than one buy certainly strengthens the criminal case and demonstrates to the Inspector and the prosecuting attorney the intent of the postal employee.

Postal employees who are found to be under the influence of a controlled substance on the job are first referred to the Medical Unit and EAP, as appropriate.

Question 2: The Postmaster General has stated that drug abuse is a significant problem within the Postal Service in certain urban areas. Why not appoint a management person (postal drug czar) to deal with the problems of drug and alcohol abuse within the Postal Service, including oversight of the EAP program?

Answer: We believe that there is good coordination between our human resources staff and the Inspection Service, the two organizations most directly involved with substance abuse issues. The establishment of an additional position for this program is not needed.

Question 3: I believe to have a truly effective program, the Postal Service should try its hardest to locate the EAP offices in a private area away from the workroom floor. Why are the EAP offices in some post offices in prominent view of the workers? What procedures are followed to ensure the anonymity of employees who participate in the program?

Answer: While we try to locate the EAP unit away from the workroom floor, space is not always available. We are concerned with the anonymity issue and we have been and will continue to seek a resolution to this problem, which has been a topic of discussion with the unions.

Question 4: How often has the Postal Service conducted quality control checks on PharmChem since preemployment screening has begun? Please list the dates of these control checks.

Answer: PharmChem Laboratory is being monitored through several different methods. Prior to activating the field submission of samples to PharmChem, we submitted a quality assurance set of specimens, and had a site walk through by both postal management and outside experts.

We have made arrangements with our consultant, Peter Bensinger, to coordinate the quality assurance monitoring of the laboratory, including the monthly submission of spiked samples. This approach is consistent with Health and Human Services guidelines and provides for an evaluation of the laboratory's ability to accurately and consistently discriminate among urine specimens. An outside toxicologist is also available to the Postal Service to assist with periodic site visits of the laboratory.

Consistent with our "statement of work" requirements, we monitor the laboratory on such issues as supplies, processing time, results reporting, and customer services. In addition, we have a system in place to solicit comments from our field sites on their experience with the program.

It should be noted that PharmChem Laboratory has received certification from both the College of American Pathologists (CAP) and the National Institute on Drug Abuse (NIDA), which provides for on-site inspections and a review of laboratory personnel qualification, testing methods, equipment, results reporting, and quality control prior to receipt of certification.

Question 5: Please list the cities where preemployment testing is currently in place and outline the time frame as to when the program will be implemented nationwide.

Answer: We have implemented applicant drug testing in the following field division cities:

- Baltimore, MD
- Birmingham, AL
- Buffalo, NY
- Chicago, IL
- Cleveland, OH
- Dallas, TX
- Denver, CO
- Jacksonville, FL
- Miami, FL
- Milwaukee, WI
- New Orleans, LA
- New York City
- North Suburban, IL
- Oakland, CA
- Orlando, FL
- Richmond, VA
- Sacramento, CA
- San Diego, CA
- Seattle, WA
- Southern Maryland
- Springfield, MA
- St. Louis, MO
- Tampa, FL
- Washington, DC
- Westchester, NY

We will be conducting implementation training classes through the end of the fiscal year, and will have all sites at the remaining field divisions fully activated by the end of the year.

Enclosure II

Responses to the Observations and Questions on AN EMPIRICAL EVALUATION OF PREEMPLOYMENT DRUG TESTING IN THE UNITED STATES POSTAL SERVICE: INTERIM REPORT OF FINDINGS from Chairman Frank McCloskey

The following paper is a reponse to the concerns raised by Chairman McCloskey regarding the design, methodology and results of the subject study. The paper is organized to provide a response to each direct question in the Chairman's submission. Also included are more general responses to the key observations regarding the study. The responses are organized under the numbered section headings in Chairman McCloskey's paper.

We have departed from that order in one regard, since a response to the observations in the final section of the paper (VII.) seems an appropriate way to introduce our entire response. In that section Chairman McCloskey observes that the study does not address "the point that error is reduced, not eliminated, and that potential for errors of another kind exist if the policy is adopted--a larger number of otherwise acceptable applicants will not be hired... In both groups, the majority of employees appear to perform at satisfactory levels."

No selection procedure is absolutely perfect in predicting subsequent work behavior. The purpose of the Postal Service's drug study was to assess the degree to which drug test results contribute to the prediction of important indicators of job performance and therefore improve the likelihood of hiring quality employees.

Specifically, the study examined the involuntary separation rates and the absenteeism rates of employees testing positive compared to those who tested negative and found statistically significant differences between the two groups. Job applicants who tested positive took significantly more leave and were fired at a 40% higher rate than negatives. These differences were also practically significant as evidenced by the cost savings estimates derived in the utility analysis. This is an appropriate methodology under the Uniform Guidelines on Employee Selection Procedures to evaluate the type of selection device in question.

I

Q. Can the results of the study be generalized to the population of new hires?

A. We are confident that the study prevalence rates used to compute the utility estimates for the national program represent the best available prevalence rates. Indeed, due to the very nature of the study design, the study prevalence rates would tend to underestimate the population prevalence rates.

As stated in the interim report, the sampled sites were concentrated in large urban areas. Consequently, the observed prevalence rates may be perceived by some as over-estimates of the national prevalence rates. However, it should be noted that the drug tests for the study sample were performed at a later stage in the selection process than occurs in the national program. This had the effect of reducing the number of positives available to participate in the study, thus reducing the study prevalence rates compared to the national program. Given that the estimated prevalence rates were viewed as underestimates of the population prevalence rates, they were used to derive conservative estimates of the utility of the national program.

The observed statistical effects are based on a much greater sample size and statistical power than that of previous studies of similar design and are considered by experts in the field to be the best scientific estimates available. Therefore, the use of the observed estimates in deriving the utility of the national program is fully justified.

II

Q. Is the statement on p. 48 "... that it would be extremely unlikely to have an applicant erroneously test positive ..." supported by the quality control evaluation results?

A. Yes, it is. As stated in the interim report, the results of the quality control evaluation revealed no false positive samples.

Q. Is the quality evaluation reported in the study different from NIDA guidelines?

A. Yes, it is. The primary reason for the difference results from the fact that NIDA's mandatory guidelines are intended for federal drug testing programs rather than scientific research studies where no employment or other personnel actions are taken as a result of the drug test results. Furthermore, at the time the Postal Service's quality control study was designed (i.e., November, 1987), NIDA had not yet issued its guidelines (they were not issued until April, 1988). Consequently, the Postal Service research team met with NIDA's technical and administrative staff to review the Postal Service's quality control study design. After having reviewed the Postal Service's quality control study, NIDA's technical staff concluded that the Postal Service's quality control study was technically sound and went well beyond what would be expected in a research study.

It should be noted that the Postal Service quality control study did not limit the detection of false positives to the blank samples and samples containing cross-reactive agents. In addition to these two types of samples, the Postal Service included in its quality control study 50 additional samples containing the drugs or their metabolites at concentration levels just below the cutoff levels. It could be argued that the inclusion of such samples renders the Postal Service quality control study more sensitive to detecting false positives than would current NIDA guidelines.

III

Q. What is the estimated cost of implementing the drug testing program?

A. The U.S. Postal Service has estimated the laboratory cost to be $1.6 million. Approximately 150,000 eligibles will be tested at the personal suitability stage of the selection process at a negotiated contract cost of $10.96 per sample. Depending on the state of their medical staffing and facilities, some offices may experience additional administrative costs in adding the drug screen to their current preemployment processing.

IV

Q. How similar are the demographics between the group that tested positive and the group that tested negative?

A. As outlined in the Results section of the report, the odds of testing positive were higher for Blacks, males, and people between the ages of 25 and 35. Although there were demographic differences between the two groups, they were controlled for in the statistical analyses. In order to do so, the interim report and follow-up analyses have included these demographic characteristics in the regression equations. This allows one to assess the relationship between drug test results and the outcome measures after having accounted for the demographic characteristics. The report shows that after having controlled for these demographic characteristics, drug test results were still found to be a viable predictor of the outcome measures.

V

Q. Were other analyses of leave performed? If so, what were the results?

A. Preliminary data analyses examined various types of leave statistics and distributions for all the absenteeism measures (including sick, LWOP, and AWOL). This was done to ensure the integrity and accuracy of the data. For the reasons laid out in the response to the next question, results were developed only for the combination of leave types included in the definition of "absenteeism."

Q. No separate analyses were reported for each type of leave, or combinations such as AWOL with LWOP, sick with LWOP. Why not? Why were no analyses performed on annual leave? Why not add annual leave into the analysis?

A. For the purpose of this interim report, absenteeism was defined as being a function of three different types of leave: sick leave, leave without pay (LWOP), and absent without official leave (AWOL). This definition automatically excludes vacations, holidays, and so on.

All career employees accumulate and are expected to use annual leave during the normal course of employment. The use of annual leave, for the most part, is heavily influenced by the timing of vacations and other planned leave. Although employees are granted emergency annual leave under certain extenuating circumstances, its use for this purpose is very much the exception and not the rule.

The vast majority of annual leave is approved ahead of time, whereas the types of leave constituting the study's absenteeism measure (sick, LWOP, and AWOL) are generally not approved in advance. This distinction has important organizational consequences since it is generally the case that when an employee is not on the job as scheduled, the job is probably being done less efficiently by another employee or is not being done at all.

The variability of annual leave as a measure of absenteeism rests more with its timing than its extent of use. All employees are expected to use their earned vacation time at some point. The organizational constraint is on "when" they can use it and not "if" they can use it. Because annual leave is such a contaminated measure it is normally not included in absenteeism statistics and measures reported in the professional literature.

Q. Are there plans to obtain the missing absenteeism data and perform this analysis again?

A. During the planning stage of the study, the unavailability of leave information for certain participants was taken into account while finalizing the study's methodology. The unavailability of that data for the purpose of statistical analysis does not justify labeling it "missing data." It would be impractical to attempt to manually collect that information.

Q. What was the median absence rate for employees who tested positive and for employees who tested negative?

A. The median absence rate of the employees who tested positive was 1.35% whereas the median absence rate of those employees who tested negative was 0.61%.

VI

Q. What is the basis for asserting that if the cutoff levels for determining whether a urine sample is drug positive were lowered, the prevalence rate of the positive sample would increase and affect the magnitude of the observed relationships upward? How do you know that the relationship would hold up?

A. The accuracy of a test is measured by its sensitivity and specificity. Sensitivity refers to the likelihood that a test will give a positive result when a drug (or drug metabolite) is present. Specificity refers to the likelihood that a test will give a negative result when a drug (or its metabolite) is absent. Given the high sensitivity of the EMIT test and its relatively low detection limits as well as the high specificity associated with performing the EMIT and GC/MS tests in series, a lowering of the initial screening cutoff score (i.e., EMIT) would result in higher prevalence rates with approximately the same combined specificity.

With regard to the magnitude of the observed relationship, the study has established that there is a positive relationship between drug test results and the outcome measures. Furthermore, the study results have revealed that there are no false positives in the positive group and that, given the combined sensitivity and specificity of the tests, the negative group includes individuals with drug metabolites in their urine at concentration levels below the cutoff levels. The lowering of the cutoff levels of the initial screening test would reduce the number of misclassified negative applicants and, given the positive relationship between the variables studied, would increase the observed effect sizes.

Q. Have the authors of the study performed an analysis on those applicants who were categorized as negative because the drugs in their urine were below the cutoff levels for inclusion in the positive group?

A. No such analyses were performed. Nonetheless, in future analyses, the research team intends to examine the impact on the relationships of reducing the initial screening cutoff level of marijuana.

Q. If cutoff levels were lowered, would we be more likely to detect infrequent users of drugs? If so, would these users show the same pattern of behavior on job performance indicators as the group reported as positive in the study? Or, would this group be more like new hires who tested negative?

A. Given current testing technology (urinalysis), no inference concerning the frequency of an individual's drug use can be made on the basis of the detected concentration level of a drug or its metabolites. Thus, lowering cutoff levels would not lead to a conclusion about the frequency of use one way or the other.

GENERAL COUNSEL
Law Department
Washington, DC 20260-1100

June 14, 1989

Honorable Frank McCloskey
U.S. House of Representatives
Committee on Post Office
and Civil Service
Subcommittee on Postal Personnel
and Modernization
209 Cannon House Office Building
Washington, D.C. 20515-6250

Dear Congressman McCloskey:

This is in response to your request that the Postal Service provide you with its views concerning the effect of the Rehabilitation Act in the context of applicant drug testing.

The Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701-796(i), provides a comprehensive approach to dealing with the handicapped. Section 501 of the Act provides that:

> (b) Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall . . . submit . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps . . . .

29 U.S.C. §791(b) (Supp. 1989). The regulations promulgated by the Equal Employment Opportunity Commission to implement section 501 provide that an agency need only hire "qualified handicapped individuals." In 29 C.F.R. §1613.704(f), a "qualified handicapped person" is defined as "one who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others . . . ."

Section 504 of the Act provides further that:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (Supp. 1989). Significantly, in amending the Rehabilitation Act in 1978, Congress specifically provided that the term "otherwise qualified individual with handicaps" as used in Section 504 does not include any individual whose current use of drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current drug abuse, would constitute a direct threat to the property or the safety of others. 29 U.S.C. § 706(8)(B).

Initially, we note that a positive drug test does not mean the individual tested is handicapped and thus within the protection of the Rehabilitation Act. As the Merit Systems Protection Board recently observed:

> The Rehabilitation . . . [Act was] intended to provide assistance to individuals who, because of the long-term effects of drug abuse, have lost the ability to control their behavior . . . . [It was] not intended to protect those who misuse . . . drugs occasionally, but who retain control of their actions and must be held accountable.

McCaffrey v. U.S. Postal Service, 36 M.S.P.R. 224, 229 (1988).

Moreover, even as to drug users who are "handicapped" within the meaning of the law, the legislative history of the Rehabilitation Act makes clear that Congress did not intend to require employers to hire individuals who could not perform their jobs. Senator Harrison A. Williams, the floor manager of the 1978 Amendments to the Act, made this clear when he stated that an amendment "would reassure employers that it is not the intent of Congress to require any employer to hire a person who is not qualified for the position or who cannot perform competently in his or her job." 124 Cong. Rec. 30323 (statement of Senator Williams). Additionally, he later pointed out that the provisions of Title 29 provide explicitly that:

> [C]overed employers need hire and retain only "qualified handicapped individuals." All authorities interpreting current law have clearly understood that handicapped individuals can be held to the same performance standards that an employer demands of all employees. [Id.]

Although not a case involving drug use, Judge Gesell's discussion of a federal employer's obligation under the Rehabilitation Act in Bruegging v. Burke, 696 F. Supp. 674 (D.D.C. 1987), is instructive. In Bruegging, plaintiff, a handicapped person by reason of his cerebral palsy, claimed that the National Archives had discriminated against him by not promoting him. Central to his claim of discrimination was the assertion that "some effort beyond nondiscrimination and reasonable accommodation is mandated by the Rehabilitation Act of 1973, as amended, when handicapped individuals are thwarted by failure to promote." 696 F. Supp. at 676. The evidence established that the plaintiff had difficulty in accurately reviewing for publication Federal Register notices, and that other employees had been promoted instead of him because of their superior accuracy. Finding that the Rehabilitation Act did not require the National Archives to lower its standards of accuracy because Mr. Bruegging could not meet them, the Court held that plaintiff's "concept of affirmative action is carried too far." Id.

The Postal Service is uniquely dependent on a reliable and trustworthy workforce. As one court has noted:

> By Congressional mandate, the very function of the Postal Service is to transport millions and millions of pieces of mail and valuable property in extremely tight time schedules throughout the United States in the most efficient manner. See 39 U.S.C. §§ 101(a) and 403(a). To accomplish this enormous task, the Postal Service must be assured of an effective workforce.

Boyd v. United States Postal Service, 32 FEP Cases 1217, 1223 (W.D. Wash. 1973), aff'd 752 F.2d 410 (9th Cir. 1985). See Wimbley v. Bolger, 642 F. Supp. 481, 485 (W.D. Tenn. 1986), aff'd, 831 F.2d 298 (6th Cir. 1987); (no violation of Rehabilitation Act in terminating employee who fails to be regular in attendance, as it is "elemental that one who does not come to work cannot perform any of his job functions, essential or otherwise").

As you know, the Preliminary Report of the Postal Service's Multi-Site Drug Study shows that applicants testing positive for drug use are more likely to be terminated during probation and have a higher leave use rate than applicants testing negative. Consequently, we do not believe the Rehabilitation Act imposes a duty on the Postal Service to compromise its standards and hire individuals whose present use of drugs may impair its ability to fulfill its mission.

Sincerely,

Louis A. Cox

Mr. MCCLOSKEY. Mr. de Lugo is here, my distinguished colleague.

Mr. DE LUGO. Thank you, Mr. Chairman. I just have a brief statement.

Let me say that I want to thank the Chairman for the Subcommittee on Postal Personnel and Modernization, Mr. McCloskey, for holding this Oversight Hearing on the Postal Service's pre-employment drug testing policy.

Today's hearing related to the drug-testing policy in the Postal Service is extremely timely. We all agree that drugs are a menace to our society. I can tell you that we are having a hell of a problem with it in my district. It is in the workplace; it is in the schools; it is everywhere. That is not just in my district. It is throughout communities, the length and breadth of this country today.

Drug usage in the workplace is taking its toll on employee absenteeism and work-related injuries, particularly in an industry such as the postal industry where some postal workers operate heavy and dangerous equipment and handle large sums of money. It is important that the workplace is both safe and secure.

However, I am concerned that when we begin testing individuals for drugs that we do not infringe on their rights. I believe that it is important to have a specific reason or cause to test an employee. Additionally, I am concerned that the Postal Service have an adequate employee drug assistance program in place to help employees who test positive for drugs.

Hopefully, employees found using drugs are not just fired and cast away.

These are just some of my concerns on this issue. I believe that those who want to get off drugs should be given every assistance to get the type of help that is needed to break that habit.

I understand that there are strong views on both sides of this issue, and I look forward to hearing the testimony of the witnesses today. I am certain that the testimony will be very imformative.

Again, I want to thank the chairman of the subcommittee, Mr. McCloskey for holding these hearings today.

Mr. MCCLOSKEY. Thank you very much, Mr. de Lugo. I will say that Mr. Trosch did an admirable job. Obviously, there is a lot to work on, but I think he shares most of our concerns.

I think the conversations with the Postmaster General, and as we have talked here today, would indicate to me that there is a lot to do in the post-employment process as far as enforcement, counseling, and legal back-up. I think we've had a good set of statements from Mr. Trosch.

I would like also to say, Mr. Trosch, we have several written questions that we would like to send to you for submission in the record. Again, as a point of information and my education, it would be very helpful if I could get a written statement as to your legal and constitutional justifications for this, given the present state of Supreme Court decisions and constitutional law. Maybe I am missing something, but I will say so if you convince me otherwise.

Mr. TROSCH. We will be happy to respond to the questions that you provide Mr. Chairman.

Mr. MCCLOSKEY. Great. Thank you very much, Mr. Trosch.

Mr. TROSCH. Thank you, Mr. Chairman.

Mr. McCLOSKEY. We are going to go to Mr. William Burrus, Executive Vice President of the American Postal Workers Union.

Mr. Nilan, Mr. Burrus, Mr. Hajjar, it is really good to see you today. We appreciate your input on this. I have read Mr. Biller's statement, and I find it has much to offer.

You can proceed as you like.

STATEMENT OF WILLIAM BURRUS, EXECUTIVE VICE PRESIDENT, AMERICAN POSTAL WORKERS UNION, ACCOMPANIED BY PATRICK J. NILAN, LEGISLATIVE DIRECTOR; AND ANTON HAJJAR, ATTORNEY

Mr. BURRUS. Thank you, Mr. Chairman.

Mr. Chairman and members of the Committee, I am William Burrus, the Executive Vice President of the American Postal Workers Union, AFL–CIO.

The American Postal Workers Union is the largest postal union in the country, representing over 365,000 active and retired postal workers nationwide.

I am accompanied this morning by Pat Nilan, Director of Legislation, and our legal counsel, Anton Hajjar.

Mr. Chairman, I would like to preface my remarks by placing in the record, making it very clear, that the American Postal Workers Union is opposed to the sale, use, or abuse of drugs by postal employees or applicants for postal employment.

We are equally opposed to the violation of constitutional, civil or contractual rights by the employer in an effort to enforce a perceived belief that applicants for employment might be abusers or users of drugs.

We are pleased to appear before the Committee this morning to comment on the pre-employment drug testing program of the U.S. Postal Service. My complete statement on this subject has been provided to the Subcommittee, and I will summarize that statement here.

Drug use by postal employees is now handled as it should be, through the Employee Assistance Program. Employees are not disciplined. They are referred to the EAP for counseling.

Participation in this program is supposed to be completely confidential, although in practice employees suspect that supervisors and others are informed, and that participants are urged to become informants. The Postal Service should take all possible measures to protect the confidentiality of the Employee Assistance Program.

One way that an employee can be referred to the assistance program is if a Postal Service doctor in performing a fitness-for-duty examination requires a urinalysis which tests positive. According to Postal Service policy, the only circumstance in which it performs a drug test on current employees is when a physician orders one in connection with a fitness-for-duty examination or to monitor progress in the assistance program.

However, the Postal Service has two other drug testing programs which are of great concern to the American Postal Workers Union. Namely, its so-called drug testing validation study and its recently imposed across-the-board screening of all postal service applicants.

Both of these programs were the subject of a recent week-long hearing before the National Labor Relations Board as a result of charges brought by the American Postal Workers Union. We believe, backed by the NLRB General Counsel, that the Postal Service should have negotiated these programs with the union.

All told, over 3,600 of the applicants who were tested were hired, including over 300 drug users. According to the Postal Service, the performance of those applicants who tested positive was then measured against that of a control group, using several categories which include absenteeism, accidents, disciplinary incidents, turnover, worker's compensation claims, and successful completion of probation.

Demographics gathered, such as age, race, and ethnic origin, was also collected on the applicants, and detailed personal histories were gathered.

Of course, the Postal Service experiment was anything but pure science. At the NLRB hearing, pursuant to a subpoena, the Postal Service provided a memorandum dated May 27, 1987 which explained that the purpose of the study was not to consider whether to conduct across-the-board screening of applicants. That decision had already been made on November 6, 1986 when the Corporate Executive Committee decided to proceed with screening of all applicants.

Rather, the memorandum candidly stated that a key purpose of the study was to provide objective research evidence which would assist the Postal Service in successfully defending legal challenges.

It was also uncovered at the hearing that former President Reagan's Justice Department actually opposed the study because it was fearful that the results would undermine its historical propaganda designed to get employers all over the country to adopt drug testing.

On January 13, 1989, the last day of the NLRB hearing, the Postal Service released a six-month interim report on the validation study. The report claims to have uncovered a correlation between a positive drug test and two employment variables: attendance and turnover.

The union has employed a consultant to evaluate the report. But even a layman can see some of the holes in this experiment.

Let us look at the issue of probation, for example. Of the 315 applicants who tested positive, 273, or 86.7 percent, successfully passed probation. By comparison, 90.1 percent of those testing negative passed probation. Is it really worth invading the privacy of every applicant for postal employment and worth the millions of dollars the Postal Service will spend on drug testing, to weed out 3.4 percent more of the applicants who may not successfully complete probation?

This is the reason for probation, for management to have an opportunity to review the work, the attitude, the condition of an employee, to determine whether or not he will make a successful employee.

The regular non-drug testing applicant screening procedure correctly predicted adequate job performance during probation 90.1 percent of the time, as opposed to the drug test successful prediction of inadequate performance 13.5 percent of the time.

We question if this result was worth the monetary cost, the risk to fellow postal workers and the massive invasion of the personal privacy of 3,655 applicants, the vast majority of whom tested negative.

What about all of the other areas? Accidents, injuries, claims and discipline, in which even those who tested positive performed adequately?

I must point out, Mr. Chairman, that through this test the Postal Service has done exactly what they claimed they had no desire to do. That is to bring into the Postal Service individuals who have tested positive for drug use.

What about the union's role in this? Please keep in mind that 315 drug users were actually hired. Other applicants, who may have made exceptional employees but because of principle refused to be tested, were denied employment.

Further, records are being kept on all subjects, whether they tested positive or not. Bargaining should have occurred. This is not my opinion or that of the APWU, but the General Counsel of the National Labor Relations Board.

We learned of the first study, the Boston Study, only after our local found out about it and filed suit against the Postal Service. We discovered the nationwide headquarters-sponsored tests through a leak to internal union sources in October of 1987 and complained to both the Postal Service and the NLRB regarding that test.

We were then advised of the nationwide drug testing of applicants on June 24, 1988, the same day that the program was announced to the public through a USPS release. The first time that we were provided with the details of either program was at the trial of the hearing on our complaint.

We know from the NLRB hearing that the procurement contract for nationwide applicant screening alone will cost the Postal Service $3.7 million per year. This contract was signed on June 20, 1988, at the very time that the Postal Service was supposed to be cutting $160 million of its operating budget and was closing retail windows, curtailing Sunday mail collection and processing, and inconveniencing both postal employees and the mail-using public.

We know, further, that the decision to proceed was made before the Postal Service began to study whether drug tests had any validity in predicting job performance or conduct.

Furthermore, Postal Service policy up to that time precluded turning down an applicant solely on the basis of a drug test.

Why would the Postal Service embark on this massive effort before it had any evidence about whether drug testing had any validity in establishing a nexus between the applicant's medical condition and his or her ability to perform assigned duties?

There are many serious legal and policy questions about across-the-board testing of job applicants for drugs. One important issue is the matter of civil liberties. The Constitution protects Americans from unreasonable searches as well as protecting our right to privacy. Yet, in this program the Postal Service has begun an unprecedented invasion of personal privacy and started to search thousands of citizens each year.

I am mindful of the recent Supreme Court decision, but the Postal Service testing program does not fall within either of the categories previously addressed by the Court.

And, I wonder, Mr. Chairman, if in fact all applicants will be tested. There are applicants and there are applicants. Will the next Postmaster General be considering an applicant and subject to the testing process? Will the next applicants for the senior management positions be considered applicants and subject to the testing process?

Mr. McCLOSKEY. I have a tendency to doubt that, Mr. Burrus.

Mr. BURRUS. So do I, Mr. Chairman.

It must also be considered that in fact no test can tell anything about an individual's present narcotic intoxication. Unlike a breath test for alcohol, a positive drug test cannot demonstrate if an individual has been or will be impaired on the job.

Therefore, it is valid to question whether the Postal Service is engaged in its legitimate role of monitoring on-the-job behavior or is it really engaged in social engineering at the expense of postal rate payers.

Finally, we question why the union was left out of the planning on this program. This drug screening certainly determines who enters our bargaining unit. And we have questions and concerns over many aspects of the program.

How reliable, for example, are the laboratories? How valid are the chain of custody procedures? How secure are the records? How is the gender, age, ethnic, racial and handicapped composition of the bargaining unit affected? Finally, how accurate are the tests?

The National Labor Relations Board will decide whether or not bargaining over drug testing was mandatory. But why should the Postal Service not bargain on a voluntary basis? Common sense dictates that the process of bargaining will bring to light possible flaws in the proposal and increase its credibility with postal employees and the public.

Mr. Chairman, drugs are a scourge on this society, but politically-inspired or hysteria-driven proposals which trample the rights of citizens, short-change the interests of employees, and ignore employees rights to negotiate through their unions are not the answer.

There has been a lot of heat on this issue but not much light. We firmly believe that more deliberate scientific inquiry of the Postal Service proposal is required, and it is for that reason that these hearings are so important.

We appreciate the opportunity to be heard on this critical issue, and we will be pleased to answer any questions you may have.

[The prepared statement of Moe Biller follows:]

STATEMENT OF
MOE BILLER, PRESIDENT
AMERICAN POSTAL WORKERS UNION, AFL-CIO

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: I am Moe Biller, President of the American Postal Workers Union, AFL-CIO. The American Postal Workers Union is the largest postal union in the country, representing over 365,000 active and retired postal workers nationwide. I am pleased to appear before the Committee this morning to comment on the pre-employment drug testing program in the United States Postal Service.

I want to emphasize that APWU does not condone on-the-job drug use and sale -- we are totally opposed to it. Those who sell or use drugs on postal premises are subject to discipline. Those who use drugs for recreation or because of an addiction should seek immediate help and the Postal Service should provide the necessary assistance.

Drug use by postal employees is now handled as it should be, through the Employee Assistance Program -- the EAP. Employees are not disciplined, they are referred to the EAP for counseling. Participation in this program is supposed to be completely confidential, although in practice, employees suspect that supervisors and others are informed, and participants are sometimes urged to become informants. The Postal Service should

take all possible measures to protect the confidentiality of the Employee Assistance Program.

One way an employee can be referred to the EAP is if a Postal Service doctor, in performing a fitness-for-duty examination, requires a urinalysis which tests positive. According to Postal Service policy, the only circumstances in which it performs a drug test on current employees is when a physician orders one in connection with a fitness-for-duty examination, or to monitor progress in the EAP. As I stated before, these are supposed to be non-disciplinary, remedial and confidential transactions.

However, the Postal Service has two other drug testing programs which are of great concern to the APWU, namely, its so-called drug testing validation study and its recently imposed across-the-board drug screening of applicants. Both were the subject of a recent week-long hearing before the National Labor Relations Board as a result of charges brought by the APWU. The APWU, backed by the NLRB General Counsel, insists that the Postal Service should have negotiated these programs with the Union. I will explain why after I briefly outline these two programs.

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The so-called "validation study" was first conceived in Boston in 1986 by two Postal Service researchers, without the knowledge of Postal headquarters. When headquarters management found out about it, they adopted and expanded the study to 20 sites. All applicants who would otherwise have been hired were tested, and both those who tested positive and those who tested negative were actually hired. If applicants refused to take the test, they were not hired.

All told, over 3600 of the applicants who were tested were hired. In this group, over 300 drug users were employed. According to the Postal Service, the performance of those who tested positive was then measured against that of a control group using several measures of employment, including absenteeism, accidents, discipline, turnover, workers compensation claims, and successful completion of probation. Demographic data such as age, race and ethnic origin, was collected on them and detailed supplemental personal histories were gathered.

As you can see, thousands of postal workers were used as guinea pigs and had detailed dossiers kept on them. Their fellow workers, contrary to Postal Service

policy, were subjected to the risks of working with people who had tested positive for drugs but who were not required to seek treatment or counseling.

Of course, the Postal Service experiment was anything but pure science. At the NLRB hearing, pursuant to subpoena, the Postal Service produced a May 27, 1987, memorandum which explained that the purpose of the study was **not** to consider **whether** to conduct across-the-board screening of applicants. That decision had been made on November 6, 1986, when the Corporate Executive Committee (composed of the Postmaster General) decided to proceed with screening of all applicants.

Rather, the memo candidly stated that a key purpose of this study was to provide "objective research evidence which will assist the Postal Service in successfully defending legal challenges." It came out at the hearing that Reagan's Justice Department actually opposed this study, because it was fearful that the results would undermine its hysterical propaganda designed to get employers all over the country to adopt drug testing.

On January 13, 1989 -- the last day of the NLRB hearing -- the Postal Service released the six-month

Interim Report on this study. The report claims to have uncovered a correlation between a positive drug test and two employment variables: attendance and turnover. The APWU has employed a consultant to evaluate this report. But even a layman can see some of the holes in this experiment. Let's take the issue of probation, for example.

Of the 315 applicants who tested positive, 273 -- 86.7% -- successfully passed probation. By comparison, 90.1% of those testing negative passed probation. Is it really worth invading the privacy of every applicant for Postal employment, and worth the millions of dollars the USPS will spend on drug testing in order to weed out 3.4% more of those applicants who may not complete probation?

The regular (non-drug testing) applicant screening procedure correctly predicted adequate job performance during probation 90.1% of the time, as opposed to the drug tests successful prediction of inadequate performance 13.5% of the time. We again question if this result was worth the cost, the risk to fellow postal workers and the massive invasion of personal privacy of

3655 applicants -- the vast majority of whom tested negative -- who were required to submit to the screen? What about all the other areas in which even those who tested positive performed adequately -- accidents, injuries, claims, discipline? I have to conclude that drug testing did not and does not make good business sense.

But what about the Union's role in this? Please keep in mind that 315 drug users were actually hired. Other applicants who may have made exceptional employees and who refused to be tested, perhaps as a matter of principle, were denied employment. Yet, records are being kept on all subjects, whether they tested positive or not. **The Union should have been informed!**

We learned of the Boston study here in Washington only after the Boston local found out about it and sued the Postal Service. We discovered the nationwide headquarters-sponsored tests in October 1987 through a leak to internal union sources, after which we complained to both the Postal Service and the NLRB about it. We were advised about the nationwide drug testing of applicants on June 24, 1988, the same day that the program was announced to the public in a Postal Service press release.

The first time we were provided the details of either program was at the NLRB trial. Before the NLRB, the Postal Service testified that all necessary plans and precaution were taken, so the Union did not have to know about the drug testing and the Postal Service did not have to negotiate over the drug testing. This arrogant and patronizing Postal Service attitude is totally inconsistent with the stated desire of the Postmaster General to have more cooperative relations.

We know from the NLRB hearing that the procurement contract for nationwide applicant screening alone will cost the Postal Service **$3.7 million per year.** The contract was signed on June 20, 1988 at the same time that the Postal Service was supposed to be cutting $160 million of its operating budget, closing windows, curtailing Sunday mail collection and processing, and inconveniencing both employees and the public.

We know that the decision to proceed was made before the Postal Service began to study whether drug tests had any validity in predicting job performance or conduct. Furthermore, Postal Service policy up to that time precluded turning down an applicant solely on the basis of a drug test.

Let me quote David Charters, then Postmaster General for Labor Relations, in a 1985 memo to the field:

> This is in reference to personal and medical suitability determinations that involve drug abuse.
>
> The Office of Labor Law issued an opinion in 1982, that the Postal Service has the right to administer urinalysis/chromatography tests. The opinion further noted that an applicant cannot be automatically rejected from employment consideration because of a positive chromatography test. A refusal to hire must be based on establishing a nexus between the applicant's medical condition and eligibility to perform essential requirements of the position without hazard to himself or others.

Why would the Postal Service embark on this massive effort before it had any evidence about whether drug testing in general established a nexus between the applicant's medical condition and his or her ability to perform assigned duties? I think it had to be a political decision on the Postal Service's part. But the Postal Reorganization Act is supposed to insulate the Postal Service from political pressure. It is apparent that the Postal Service succumbed to political pressure on this issue.

There are many other serious legal and policy questions about across-the-board testing of applicants for drugs. One important issue is the matter of civil liberties. The U.S. Constitution protects Americans from unreasonable searches as well as protects their right to privacy.

In this program, the Postal Service has begun an unprecedented invasion of personal privacy and started to search thousands of citizens a year. It is nothing short of a dragnet, in which an overwhelming majority of non-drug users will be snared in an effort to catch a few who transgress. The search of large numbers of innocent persons by the government to discover the handful of guilty persons is unreasonable by any definition.

I am mindful of the fact that the Supreme Court recently ruled that it was constitutional for the government to test certain federal employees in critical law enforcement positions such as customs inspection. The Court has also upheld a Department of Transportation rule requiring drug testing of employees in the public transportation industry. Postal workers fit neither category.

Let me quote from the **Washington Post** editorial of March 22, 1989, with which we concur:

> Searches without probable cause -- especially when they involve intrusive procedures requiring blood and urine samples -- are an invasion of privacy that cannot be squared with the Fourth Amendment except under the most limited circumstances. We believe they are justified when lives are at stake, as in the railroad case, but not where the government seeks only to protect its image or guard against some remotely possible contingency where the danger is less serious. Any employee whose conduct gives evidence of possible drug or alcohol abuse leaves himself open to challenges and penalties. But the wholesale testing of hundreds of thousands of federal workers on the most tenuous of grounds must be resisted.

Another important consideration is the fact that no test can tell you anything about an individual's present, on-the-job narcotic intoxication. Unlike a breath test for alcohol, a positive drug test tells you nothing about whether a person has been or will be impaired on the job.

It is valid to question whether the Postal Service is engaged in its legitimate role of controlling behavior on the job or is really engaged in an unauthorized effort at social engineering at the expense of postal rate payers. If it is the former, drug tests won't help. If it is the latter, the Postal Service has no business doing it.

Also connected to the matter of the job-relatedness and predictive value of drug screening is the issue of discrimination. If, as we believe, the Postal Service may only be concerned only with the on-the-job effects of drug use and not with the private lives and habits of citizens, the tests must be validated for job relatedness, just like any other pre or post-employment test. I am told by experts, however, that the experiment does not meet the requirements of scientific validation.

For example, were a regression analysis done on the Postal Service data, factoring in certain variables which could affect a given measure of job performance, a different picture could emerge as to whether the positive drug test really predicted the performance factor in question. It may be, for instance, that women with young children, or men between the ages of 18 and 21, are absent somewhat more than others. Were these variable included in the analysis, the correlation between a positive drug test and attendance may have been proved to be invalid.

Another question is the prohibition in the law against handicap discrimination. Drug addiction is a handicap and the Rehabilitation Act protects not only those who are handicapped but also those who are **regarded** as handicapped. Therefore, if an applicant tests positive and isn't hired, but **can** in fact do the job (with or without reasonable accommodation), isn't he or she really incorrectly regarded as likely to be disabled by drugs on the job? The Charters memo I quoted earlier makes it clear that this is how the Postal Service saw it in 1985, and the law hasn't changed since then.

If applicants who tested positive were required to get help rather than excluded from employment, it seems likely that any difference in probation period performance would disappear.

Finally, we question why was the APWU left out of the planning on this program? This drug screening certainly determines who enters our bargaining unit, and we have a natural concern over many aspects of the program.

How reliable, for example, are the laboratories? 1985 studies reported in the **Wall Street Journal** illustrated a high error rate for medical laboratories in general. Laboratories in New York, in particular, had a 66% error rate on their drug tests. How valid are the chain-of-custody procedures? How secure are the records? How is the gender, age, ethnic, racial and handicap composition of the bargaining unit effected? How accurate are the tests?

The NLRB will decide in our unfair labor practice case whether or not bargaining over drug testing was **mandatory**. But why should the Postal Service not bargain on a voluntary basis? Even Dr. Dupont, of Bensinger, Dupont & Associates, the Postal Service's consultant on drug testing, testified in another NLRB drug testing case that negotiations with the union would actually **improve** the program. Common sense dictates that the process of bargaining will bring to light possible flaws in the proposal and will increase the credibility of any program with employees and the public.

Mr. Chairman, drugs are a scourge on this society. But politically inspired or hysteria-driven proposals which trample the rights of citizens, short-change the interests of employees and ignore employees' right to negotiate through their unions are not the answer. There has been a lot of heat on this issue, but not much light. More deliberate scientific inquiry of the Postal Service proposal is required. That is why these hearings are so important.

On behalf of the American Postal Workers Union, we appreciate the opportunity to be heard on this subject. We will be pleased to respond to any questions you may have.

Mr. McCLOSKEY. Thank you for an excellent statement, Mr. Burrus.

Does Mr. Nilan want to add anything to that?

Mr. NILAN. I think the Executive Vice President of our union has done an exceptionally good job, Mr. Chairman.

Mr. McCLOSKEY. Thank you, I think he did too. It is an excellent statement.

Mr. de Lugo.

Mr. DE LUGO. Thank you, Mr. Chairman.

Mr. Vice President, I think you gave an excellent statement. I read your statement in its entirety. And I noted those portions that you did not touch on, such as the editorial supporting your position that appeared in the March 22nd edition of the Washington Post regarding the abuse of the 4th Amendment invasion of privacy.

Am I to understand that the postal system knowingly took in over 300 persons who they believed to be drug users?

Mr. BURRUS. Yes, sir. These are individuals that tested positive on the urinalysis test. Applicants for employment that tested positive. Because of the grand experiment that the Postal Service was undertaking, they intentionally hired those individuals and they are presently working as postal employees.

They are being used as some sort of guinea pigs, not being offered any assistance either through the Postal Service's Employee Assistance Program that if in fact they do have a drug problem, they would be provided assistance to overcome that problem. They are now intermingled throughout the work force, subjecting all of the other hundreds of thousands of postal employees to exposure and perhaps some impact with their employment.

Mr. DE LUGO. Well, I am really shocked by this. The amount of data that is being put together on these 3,600 employees that were hired—demographic data, age, race, ethnic origin—the whole thing gives me great concern.

I do not understand why the Postal Service did not seek cooperation from the union in devising a program that could have been supported by the workers and by law.

When did the union learn of this program?

Mr. BURRUS. The across-the-board drug testing—we learned of that program when the Postal Service released it to the general public. What was the exact date, Anton? Do you recall?

Mr. HAJJAR. I think it was in 1988.

Mr. BURRUS. It was a part of my presentation. I have the exact dates listed.

October of 1987.

Mr. DE LUGO. October of 1987?

Mr. BURRUS. That was the pilot study. That is when the union found out. And the across-the-board drug screening of all applicants—that is beyond the pilot study—we found out at the same time that the general public found out. June 24, 1988.

Mr. DE LUGO. Have you taken any legal steps in this matter?

Mr. BURRUS. Yes, sir. We have filed a National Labor Relations Board charge, the only avenue of relief that we have. We are currently awaiting a decision by the Administrative Law Judge on our charges.

Mr. DE LUGO. Mr. Chairman, no further questions.

Mr. McCLOSKEY. One second. I want to check on this vote situation.

There is a vote on the House floor, and I will be back within 15 minutes. I would, however, like to pursue 10 or 15 minutes worth of questions with Mr. Burrus and Mr. Nilan. If you gentlemen would give me that courtesy, I would appreciate it. The meeting is temporarily adjourned.

[Recess.]

Mr. McCLOSKEY. The hearing of this subcommittee will resume. Thank you very much, Mr. Burrus and Mr. Nilan.

You have heard many of my concerns already. I do not want to beat anything into the ground, but let me just say that it would be hard for me to find any fault with your statement. I am sure if I labored over it for hours, perhaps I could find one statement or assertion, Mr. Burrus, that you and Mr. Biller make in your statement that I could disagree with, but it does not readily come to mind.

I just thank you for an excellent statement. I think it is a major contribution to this process. I want to go over some of your concerns, and maybe try to explore a couple of other avenues for a moment.

I believe you were here earlier today. You know I am very concerned about drugs in the workplace and drugs outside the workplace and particularly, after talking to the PMG, about drugs in the Postal Service.

The PMG says there is a major problem out there—significant to massive rates of usage in the workplace in the larger cities. What is your observation on that? How big a problem is it? Are there ways we can improve on enforcement, counseling, and so forth?

Mr. BURRUS. There is a major problem, Mr. Chairman. We are a reflection of society at large, particularly being that we hire so many American citizens, over 800,000 postal employees.

It is unavoidable that if there is a major problem in our society that there would not be a major problem of some magnitude within the Postal Service.

Fortunately, because of the Postal Service testing procedure, hiring by grade score, the Postal Service is successful in weeding out a large number of applicants for employment that otherwise might have some of the undesirable baggage of our society. So, I would not suggest that the proportions of the problem within the Postal Service is of the magnitude that exists in society at large.

But, nevertheless, there is a problem in the Postal Service. And that problem should and must be addressed.

The Employee Assistance Program is a good approach to the overall problem. However, the major problem, as the union sees it, of the Employee Assistance Program, is the employee's lack of belief that the employee's activity is confidential.

In some facilities the Employee Assistance Program location is in the middle of the workroom floor where all of the co-workers can see those employees going or coming from the room providing only service or assistance. We think that is a mistake.

In addition, we believe that the Postal Service Inspection Service has undertaken a program of attempting to solve the drug use and abuse and sale problem within the Postal Service that involves in-

dividuals that perhaps otherwise would not be involved. They have a program of using informers. They will identify and apprehend an individual that does in fact use or sell drugs.

They will then convince or coerce that employee into working as an informant for the Postal Service and going out into the workplace and perhaps entrapping another employee.

Now, I heard your comment earlier, Mr. Chairman, regarding your position in regard to the use or abuse of drugs in the workplace and your lack of concern about what would occur with that employee.

Mr. MCCLOSKEY. I am afraid you are misinterpreting me, Mr. Burrus.

Mr. BURRUS. Well, I might have mischaracterized your exact statement.

Mr. MCCLOSKEY. Yes.

Mr. BURRUS. But our principal concern in regard to those employees that perhaps may have been identified is, was there unnecessary coercion, was the employee entrapped within the meaning of the law? And then, often, did the employee in fact do what the employee is being accused of doing?

We find in a number of cases that the union represents charged employees, that the evidence just does not support the fact that the employee was actually involved even though the employee is being charged.

So, there are a whole host of things that we could do to get a better handle on the drug use and abuse within the Postal Service.

There are some things that we are presently doing that we are not doing as well as we perhaps could do. Most importantly, I think the best answer, the best response to your question is that if the Postal Service would be willing to sit down with the unions in a very comprehensive way to discuss the problem, not coming to that process with any preconceived decisions—any decision that had been made in advance where they have decided within their own counsel exactly what they are going to do and now come to inform and advise the unions of the decisions that they have made—to come to the process, let us sit down and discuss the magnitude of the problem.

We do not have access to the statistics that they do, the magnitude of the problem, possible solutions, possible approaches. Let us collectively address the problem because I think all of the unions within the Postal Service—the bargaining unit and non-bargaining unit employees—share the same concern as postal management. That we are opposed to the use, abuse, and sale of drugs in the workplace or employees coming to the workplace under the influence of drug use.

Mr. MCCLOSKEY. Let's go over some of your immediate preceding comments. I assume the Postal Service representatives are still here—Mr. Haggerty, Mr. Trosch, and so forth.

I do think that you made an interesting point about on-site location of EAP offices. If you are going in and out the EAP office, that could mean something. Just as if you are going in and out of Planned Parenthood or whatever elsewhere.

Have you talked to management about greater confidentiality and perhaps outside placement of these offices? Is that an option?

Mr. BURRUS. Yes, we have talked to them, Mr. Chairman. On that and a number of other issues regarding the EAP program. Most of our complaints we are not able to resolve.

When I say resolve them, I do not mean to the satisfaction of the union. We understand that the Postal Service has an obligation, the responsibility of running the Postal Service. But the resolution of problem does not mean that either side is going to finally get their way.

The history of our raising these issues with the Postal Service demonstrates that the Postal Service has decided in advance exactly how they were going to do it, what they are going to do. They are determined that is the way it is going to be.

If we are to change it in any way, we are forced to go to the grievance arbitration procedure or some outside enforcement agency to force them to do something different.

So, we have been unsuccessful, Mr. Chairman.

Mr. MCCLOSKEY. I appreciate your suggestion as to a meeting. I was, quite frankly, thinking on the way back from the vote that it might be a good idea if we could have, in effect, a summit meeting of all interested groups on this issue—all the employee and management representatives, perhaps myself or staff work out a positive communication on counseling and enforcement improvements.

Mr. BURRUS. We would welcome the opportunity to participate in such a forum.

Mr. MCCLOSKEY. You mentioned my lack of concern, I guess, as to employees. I think you know me fairly well and over time you may think better. I understand where you are coming from, but, can you tell me, does the union ever get involved in—I guess you do because we have to be concerned for fairness, due process, legality, people telling the truth, et cetera—the defense of people accused of dealing drugs? Is that often the case or sometimes the case?

Mr. BURRUS. Yes, Mr. Chairman, we do.

Mr. MCCLOSKEY. Which is your right and responsibility. I have been a lawyer—I do not know if I have been a lawyer; I have a law degree is the way I like to phrase it—but I have been a mayor. I have been in some pretty close and tight and problematic management decisions over the years.

I am not trying to ask an unfair question. But, ultimately, would you say it is unreasonable that someone fully proven with all the due process of law as dealing drugs in the workplace should at least be considered for immediate termination?

Mr. BURRUS. I think responding to that in the abstract, Mr. Chairman, would be unfair. I think——

Mr. MCCLOSKEY. No, I do not think it is very abstract. Someone is dealing drugs on the job. It is proven. You know it. He knew it. The judge knows it. The jury knows it.

I mean, is it unreasonable to say that if you deal drugs in the workplace, you stand in dire peril of losing your job? I think that ought to be a standard.

Mr. BURRUS. Absolutely, Mr. Chairman. I think that statement, standing alone, is a fair and accurate response to the use or abuse of drugs in the workplace.

Mr. McCLOSKEY. But I am not saying you shouldn't defend the workers in cases of abuse and stand up for their rights regardless. You don't pick your clients all the time or you do not have many cases. I understand that, but we are talking about the bottom line here.

Mr. BURRUS. I think the bottom line, yes. But I think that if you have an employee with 30 years of service and you have an employee with one year of service and it is the sale of crack or heroine or cocaine versus the passage of a marijuana cigarette, an employee with 40 years of service, I think it is worth at least a review.

Mr. McCLOSKEY. Oh, I agree. But in some societies they would just shoot people for dealing on or off the job. And, you know, we are using this phrase off the job. When I was mayor I had a very blatantly virtuous police officer who used to brag about how great he was and what standard issue he was. Well, one day he went off and robbed a bank. Then the question came up as to whether it was an on- or off-duty bank robbery and if the city had an interest in a policeman robbing banks off-duty.

[Laughter.]

Mr. McCLOSKEY. I would definitely feel the same way about dealing drugs, for that matter, off-duty. But we are focusing on the workplace now.

In dealing cocaine or heroine on the floor of the Washington, D.C. Post Office, if the person's rights were fully protected and it was thoroughly proved, do you think it is unreasonable to just say, "Out of here, buddy," regardless of 29 years and nine months of service.

Mr. BURRUS. No. I would share the same feeling as you.

Mr. McCLOSKEY. Obviously there is concern for due process, legality, fairness, proof. Obviously entrapment can be a constitutional issue.

We can talk about this at one of our formal and informal meetings. But just the idea that the union is perceived as vigilantly anti-drug while maintaining your representative functions for your members and clients, I think, is very important. Maybe you want to comment on that.

Mr. BURRUS. Yes. The American Postal Workers Union has used its tabloid and its other news service items to serve as a tool to inform our members that we are opposed to drug use, we support the concept that the Postal Service should be a drug-free environment, that employees that do use drugs or sell drugs are subject to discipline, that the union is not the supporter of such activity.

We try to share with our members a message that we are opposed to drugs. Understanding very clearly that there is a difference in our society between the young generation and my generation and those beyond me. That the youth that enters the Postal Service today sees a contradiction, a very real contradiction with the abuse of alcohol that goes with a wink and a nod an their turn to substance abuse is turned upon in such a violent way.

They see that as a real contradiction. It is certainly our job to tell them that whether contradictory or not, we do not support the use or abuse of drugs.

But, in the reality, in the workplace, those postal employees, particularly the young ones, see that there is a real contradiction be-

tween the behavior of those who are enforcing the rules to take three cocktails at lunch, to be an abuser of alcohol, to abuse pills, and then to come down on them very, very hard for the use of a marijuana cigarette. They just see that as totally contradictory.

Despite the information shared by the union, putting forth our position to them, the Postal Service taking a very hard position—despite all of this, those individuals are making some individual decisions. This is a social problem, I know it is not the Postal Service's problem—but it is a problem that goes over into the Postal Service.

Mr. McCLOSKEY. Have you had any sort of professional consultant decipher that report?

Mr. BURRUS. Yes, we have retained one, Mr. Chairman.

Mr. McCLOSKEY. Have they given you a written report yet? Quite frankly, one of the things I would be seeking is a translation of that report into English that could be ascertainable by the average B-plus college grad.

Mr. BURRUS. We expect a final report within the next two weeks deciphering——

Mr. McCLOSKEY. From my old social science days, I detected all sorts of perplexing uses of information that, on my schedule and having just read it once, I would not have the confidence to get up and harangue about it. I suspect, however, there may be some methodological or interpretative problems.

Does that strike you from reading that report?

Mr. BURRUS. Yes, it does. Recalling my days of schooling, which are many, many years ago, the one thing that struck me as odd about the report—and I hope it is borne out by our professional—is that a test is designed to prove a point. That is the intent of a test.

A test for employees who are applicants for employment, the basic test is designed to determine with some validity how many employees will successfully go on to be long-term postal employees. Past their probationary period, attendance, safety, and all the other factors acceptable long-term.

The drug test is designed conversely, to prove that people that fail the drug test will not be good postal employees over a long period of time. That is the purpose of the test.

If that is factual, then that test was wrong 86 percent of the time. That just strikes me as being inconsistent. That you can have a test—perhaps if I have a test and I gave it to somebody to prove a point and it was wrong 86 percent of the time, I would believe I would have to discard that test and perhaps prepare a new one.

Mr. McCLOSKEY. Thank you, Bill. We could go on and on about that. Perhaps we could counsel together sometime and meet with the postal officials who drafted the report. I believe a little positive interchange would be good.

You heard my observations or concerns as to what happens six months to a year from now when the whole world knows when you go down to the Post Office you are going to be seeking out a bottle. Do you agree with my observations? Do you have anything to add to that? Do you not think for the expense, the efficacy of this within a relatively short amount of time fades into being minimal to nil?

Mr. BURRUS. Yes. Absolutely, Mr. Chairman. I believe that once it is known within the community where a test is given—that the Postal Service is going to demand a drug examination—then those individuals that are going to avail themselves to it will either have cleaned up their act for a necessary period of time or they will not show up to take the examination or report for the testing.

Down the road somewhere I do not think we are going to change the mix of drug users and non-drug users in the workplace.

Mr. MCCLOSKEY. I think it is going to be a very similar mix—Maybe a little less—a little bit of an improvement.

Mr. BURRUS. Same mix as there presently is. I think the only difference will be in the way people approach the testing process itself. I think it is going to change anyone's behavior.

Mr. MCCLOSKEY. I commend you for your statement, for your union's involvement in all this. You have been, I think, assertive of rights beyond your own immediate interest, to say the least, at a time when assertion of such rights is not always pleasant or resulting in laudible publicity, and all that sort of thing. So, I think you have been very helpful in this process.

Bill, just one or two more questions. There is one problem I have been wrestling with in this dilemma and it is one of the reasons I need this legal opinion from Mr. Trosch, Mr. Frank, and the postal lawyers. With your involvement so far, it would appear that the NLRB could ultimately prevail in that drug testing is a bargainable item and therefore the postal system was wrong for not conferring and bargaining, which I think is a reasonable surmise or possibility.

Going over into citizenship and the Constitution as to multi-level governmental involvement in this, I am a little bit perplexed as to how you bargain away a Constitutional right.

Mr. BURRUS. I do not know how one bargains away a Constitutional right either. We certainly would not approach the process if we ever have any——

Mr. MCCLOSKEY. This is no criticism of you. I am trying to figure out if that is what we are in to? The Supreme Court has not ruled that such searches are constitutional. It is very possible, given Mr. Scalia's statements, that they are unconstitutional.

But, yet, for the time being we are into making this a bargainable item rather than assertion of rights. I commend you for pushing for all the rights you can get for your employees, for your membership, but I just do not know if that is the forum for that.

Mr. BURRUS. Mr. Chairman, I would believe that bargaining encompasses an entire range of possibilities. If the parties are forced by the National Labor Relations Board or subsequently the courts to bargain, I think it raises the possibilities of the Postal Service and the unions collectively looking at the total problem. Not necessarily a predetermined decision to test employees in violation of their constitutional rights, but the question of what can we do in terms of drug use and abuse in the workplace.

I think in that sense bargaining would be of benefit to the Postal Service and to the applicants and to the country at large.

Mr. MCCLOSKEY. Thank you very much, Mr. Burrus.

Mr. Nilan, do any of you gentlemen have anything you want to add? It has been a very fruitful conversation. I think we ought to

have that meeting and discuss the continuing differences of opinion between the different parties in this issue because it is not going to be resolved right away. If we could talk about counseling, enforcement, fairness, follow-up with the several parties, it would be very helpful.

Mr. BURRUS. We would welcome it, Mr. Chairman.

Mr. MCCLOSKEY. I appreciate your suggestions on that. Thank you, Mr. Burrus.

Mr. BURRUS. Thank you, Mr. Chairman.

Mr. MCCLOSKEY. We will now proceed with Mr. Glenn Berrien, the newly installed President of the National Postal Mail Handlers Union. He also has with him today Marion Wright and Barbara Harvey.

Thank you good friends, please proceed as you like.

STATEMENT OF GLENN BERRIEN, PRESIDENT, NATIONAL POSTAL MAIL HANDLERS UNION, ACCOMPANIED BY BARBARA HARVEY, SPECIAL COUNSEL; AND MARION WRIGHT, SECRETARY-TREASURER

Mr. BERRIEN. Thank you, Mr. Chairman. On behalf of the National Postal Mail Handlers Union, we have already submitted our complete testimony into record. As well, we submitted a letter, via hand delivery, to your attention as of yesterday opposing any other representatives speaking on behalf of the National Postal Mail Handlers Union.

We would like both of those exhibits submitted into the record, if you would, please.

Mr. MCCLOSKEY. Without objection.

Mr. BERRIEN. Good morning. Mr. Chairman, I am Glenn Berrien, President of the National Postal Mail Handlers Union. I am accompanied here today by Barbara Harvey, our special counsel and advisor on drug testing matters, and our Secretary/Treasurer, Mr. Marion Wright.

Mr. Chairman, I would like to thank you for your invitation to come here today and speak out about the Postal Service's pre-employment drug testing program and also about Postal Service policies that address substance abuse by employees in the workplace.

We are indeed appalled and totally opposed to drug abuse in the workplace in any form. But the nationwide plague of drug abuse has reached epidemic proportions. Here in the nation's capitol we are experiencing a drug related murder rate that grows daily, with many deaths occurring within a mile or two of even this House office building.

As the father of four young daughters and fearful for their future, I realize that an answer to this problem must be found. That answer, Mr. Chairman, is not to line up employees of the Postal Service in lavatories and test them for drugs.

The Postal Service proposes drug testing all job applicants for marijuana, cocaine, and a broad spectrum of other drugs and denying employment to all applicants who test positive. Its proposal is based upon its study showing a statistically significant correlation between positive drug tests and absenteeism and involuntary termination during the first few months of employment.

The aim of this proposal is to save money. The dollars lost on absenteeism and training and breaking in replacement workers.

The Mail Handlers Union believes that this proposal will have unlawful consequences. It is contrary to the intent of Congress, as expressed in the Rehabilitation Act of 1973 and the 1978 amendments to that Act. It is designed to evade the Postal Service's statutory and contractual obligations to provide therapy and opportunities for rehabilitation to employees afflicted with alcoholism or drug addiction. And, it is unwise as a matter of social policy.

The studies show that 8.5 percent of the new hires between September of 1987 and May of 1988 tested positive; 65 percent of the positive results reported marijuana. Most of the new hires who tested positive were black males between the ages of 25 and 35.

The researchers found that new employees who tested positive had somewhat higher rates of absenteeism. They also found a higher rate of involuntary termination among those who tested positive. But this result was neutralized by another finding of an equally high rate of voluntary termination among new hires who tested negative.

The studies showed no significant relationship between the overall turnover rate and the drug test results.

The Postal Service concluded that it could save approximately $4 million annually by refraining from hiring all applicants testing positive using the EMIT-100 test, and even more money by eliminating the presumably greater number who would test positive using the EMIT-20 test instead of the EMIT-100 test recommended by the NIDA.

The Rehabilitation Act of 1973 prohibits the Postal Service from discriminating against employees and applicants for employment on the basis of physical or mental handicap. The 1978 amendments to the Rehabilitation Act were intended to make the federal government a model employer of the handicapped.

The governing regulations prohibit the Postal Service from using employment tests or other selection criteria that screen out or tend to screen out qualified handicapped applicants unless such tests can be shown to be job-related to the specific position.

The same regulations require the Postal Service to make all reasonable accommodations to employees, handicaps, that can be made without undue hardship. The statute and regulations establish clearly and unequivocally that the Postal Service cannot discriminate against job applicants on the basis of physical or mental handicap, and that the Postal Service has, as well, an affirmative obligation to offer employment to qualified handicapped applicants.

The definitions section of the Act expressly define as handicapped individuals alcoholics and drug abusers whose current use of alcohol or drugs does not prevent them from performing their job duties or threaten the property or safety of others.

In other words, the nondiscrimination and affirmative action employment obligations of the Postal Service apply to job applicants who are alcoholics or drug abusers able to perform the work without posing a threat to the health or safety of the rest of the work force.

The Postal Service's obligation to employ the handicapped, including alcoholics and drug abusers able to perform their jobs, is

even greater once the applicant becomes an employee. As postal employees, alcoholics and substance abusers are entitled to participate in the Postal Service's Employee Assistance Program and to be granted leaves of absence to undergo rehabilitation.

The federal courts tell us that it was Congress' firm intention in enacting and amending the Rehabilitation Act to require federal employees to exert substantial affirmative efforts to assist alcoholic employees toward overcoming their handicap before firing them for performance deficiencies related to drinking.

The same regulations impose the same duty towards drug abusers.

In the absence of state handicapped statutes with provisions comparable to those of the Rehabilitation Act, private employers are, as a general rule, under no obligation to refuse to employ alcoholics and drug abusers. The same is not true of the Postal Service, however.

It is clear from the way Congress drafted its definitions that it intended the Postal Service and other federal employers to serve as a part of the solution to drug abuse problems in our society by providing employment to drug abusers who are reasonably employable.

Congress defined employable drug abusers rather narrowly as either former addicts or present abusers who are able to perform their jobs and pose no danger to the work force. Applicants meeting these qualifications and who are otherwise qualified to perform the job ought to be offered both employment and all of the accommodations available to them as postal employees, including EAP counseling and the opportunity to undergo rehabilitation.

There can be no doubt that the Postal Service's proposal will cause it to run afoul of its duty to refrain from discrimination against, and its affirmative duty to employ, the handicapped.

The Agency justifies its proposal to refuse employment to qualified drug abusers as a substantial money-saving measure. This justification is patently indefensible in light of Congress' decision to require the Postal Service, as a federal employer, to assume the higher cost of employing such job applicants.

If the Postal Service is permitted to deny employment to the qualified applicants who are drug abusers, it is likely that the taxpayers will ultimately pay for their support in some other way. Congress has decided, and we think it has decided wisely, that we will all ultimately benefit by paying higher postal rates for any higher costs associated with offering employment to such applicants than by denying them an opportunity to live useful and productive lives as wage earners.

We believe that the proper focus is on the quality of rehabilitation and counseling assistance offered to postal employees afflicted with drug abuse problems. A properly run Employee Assistance Program, including rehabilitation services, will cost more in the short run than purging all known drug abusers from the work force.

In the long run, however, effective rehabilitation and counseling services will save taxpayers the much higher cost of supporting unproductive drug abusers either on welfare or in prisons. There is

ample evidence by now of the long-term cost savings of effectively run employee assistance programs.

The Postal Service's EAP program urgently needs improvement since the present program is largely ineffective. The most serious flaws in the present EAP are attributable to its being an in-house program. As any number of commentators have noted, an EAP program must be able to guarantee absolutely the confidentiality of the identities of program participants so that persons who do not care to reveal their problems to their coworkers may take advantage of the EAP.

An effective EAP, likewise, must be able to guarantee the confidentiality of all statements made by the participants to others involved in the program. Such confidentiality is a fundamental requirement of any therapy program.

The Postal Service's EAP utterly fails in these most basic requirements. At the Detroit facility, for example, the EAP office is located a few feet from the main work floor area. The identity of the program participants is a matter for the direct observation of the hundreds of workers in the vicinity of the EAP office. Even worse, it frequently happens that the substance of conversations in group meetings resurface on the workroom floor.

This latter problem is, of course, simply a function of the EAP's in-house character. All participants work at the Agency, and it is just human nature for some of the conversations held in the confidential group meetings to leak onto the workroom floor by way of other program participants.

Unfortunately, the ensuing loss of confidentiality and privacy makes effective counseling virtually impossible.

Perhaps the most insidious aspect of the Postal Service's EAP is the frequent leaking of information about participants to their supervisors. The applicable postal regulations permit the disclosure of information about an employee's continued participation and progress toward recovery to referring supervisors or managers.

All too often, supervisors learn details regarding the nature of employees' problems that go beyond simple reports on attendance and progress in the program. It is well known that such leaks occur, and employees are understandably reluctant to discuss their problems or personal lives with the EAP counselors.

Given these operating problems, the Postal Service's current EAP is ineffectual and only causes employee ill-will. It is a waste of taxpayer money.

The only effective way to eliminate these problems is to substitute a truly independent EAP for the present in-house program.

Additionally, an effective EAP must offer rehabilitation and treatment as well as counseling. What the present program offers is counseling only by quasi-professional former addicts along the lines of the Alcoholics Anonymous model. While useful, this counseling program is no substitute for detoxification or rehabilitation when such treatment is needed.

The Postal Service maintains referral lists for such services, but employees needing detoxification or rehabilitation are otherwise left to their own devices. They must take a leave of absence and make their own arrangements, including payment.

We also believe that it makes good sense to refrain from the proposed drug testing simply as an objective matter of efficient operations and economics.

Without regard to legal implications, our position is shared by some of this country's most respected institutions. The American Medical Association three years ago studied the issue of whether drug tests should be required of civilian airmen.

It recommended to the FAA that it would be wiser to test directly for signs of mental and physical impairment by measuring cognitive function. It concluded that the pre-employment drug testing should be reserved only for jobs directly affecting the health and safety of others.

Today, three years later, advances in the technology for cognitive function testing makes this option even more practical than it was when the AMA recommended it.

Drug testing simply cannot be rationalized as a check on performance impairment nor does the Postal Service seek to rationalize this proposal on such grounds.

Responding directly to the Postal Service's cost-savings rationale and putting aside the legal and moral objections, even this rationale does not withstand close examination. The Postal Service has calculated an annual cost savings of about $4 million of this figure. One million must be subtracted as the figure attributable to the savings for eliminating the involuntary terminations associated with positive drug tests. By the Agency's own admission, the number of involuntary separations attributable to positive drug tests were neutralized by the number of voluntary terminations associated with the negative drug tests.

The selection and training costs to provide the basis for this figure are presumably roughly the same for all new employees. Thus, these costs will be the same regardless of whether termination is voluntary or involuntary.

The estimated $3 million that the Postal Service attributed to the annual absenteeism costs associated with the positive drug test must be weighed, of course, against the cost of the drug tests. Assuming approximately 10,930 new applicants annually, the administrative, medical, and laboratory costs of testing are likely to approach $1.6 million annually.

The remaining asserted savings would be less than one million, in our opinion an excessive price to pay to transform approximately 918 otherwise unemployed and unproductive individuals into useful taxpaying consumers.

We have made no effort to compute the savings in general assistance and other costs saved by removing such individuals from the welfare rolls that presumably would be their only other option.

There are other practical reasons to resist the temptation to institute the pre-employment drug test. All employers—and there is no reason to exclude the Postal Service—pay an enormous price in employee morale for using this draconian policing device.

While some Fortune 500 companies have opted for pre-employment drug testing, the American Management Association found, in a survey that it conducted, that half of those companies presently requiring drug tests felt uncertain about whether it was an effective tool in dealing with workplace substance abuse.

A surprising number of respondents representing companies of all sizes indicated that pre-employment screening was intended as a statement of the firm's commitment to a drug-free workplace.

One corporate vice president and general counsel has characterized drug testing as a seductive gimmick that promises instant relief from the awesome responsibilities of management. He concluded that it just does not work.

Drug testing provides inaccurate and irrelevant information and alienates the vast majority of good employees.

Postal office mailhandlers, more often than not, are veterans. Many of our members unfortunately are veterans who are struggling to overcome alcohol and drug addictions while retaining employment in an occupation that has been identified as one of the most stressful. Nor can we afford to turn our backs on the many others who may be able to salvage their souls if offered the opportunity.

As a federal employer, the Postal Service has both a legal and moral duty to serve as a model employer by offering employment to alcoholics and drug abusers who can perform their jobs without endangering others.

As citizens and parents, we are all intensely interested in overcoming this country's current nightmare of drug abuse. But drug testing is not the answer. It is an easy matter for most determined users to evade detection while we all pay too high a price and the loss for mutual respect for each other.

We implore this Committee, the Congress, and the Postal Service to find the strength to resist the current drug-testing hysteria, what Justice Scalia last week called a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

We thank you for this opportunity to express our views.

[The prepared statement of Glenn Berrien follows:]

COMMENTS ON USPS PROPOSAL FOR DRUG TESTING
BY GLENN BERRIEN, NATIONAL PRESIDENT,
NATIONAL POSTAL MAIL HANDLERS UNION

Introduction

The Postal Service proposes drug testing all job applicants for marijuana, cocaine, and a broad spectrum of other drugs, and denying employment to all applicants who test positive. Its proposal is based upon its study, showing a statistically significant correlation between positive drug tests and absenteeism and involuntary termination during the first few months of employment. The aim of its proposal is to save money: the dollars lost on absenteeism and training and breaking in replacement workers.

The Mail Handlers Union believes that this proposal will have unlawful consequences; is contrary to the intent of this Congress, as expressed in the Rehabilitation Act of 1973 and the 1978 amendments to that Act; is designed to evade the Postal Service's statutory and contractual obligations to provide therapy and opportunities for rehabilitation to employees afflicted with alcoholism or drug addiction; and is unwise as a matter of social policy.

The Postal Service Study

The study showed that 8.5 percent of new hires between September, 1987 and May, 1988 tested positive. Sixty-five percent of the positive results reported marijuana. Most of the new hires who tested positive were black males, between the ages of 25 and 35. The researchers found that new employees who tested positive had somewhat higher rates of absenteeism. They

also found a higher rate of involuntary termination among those who tested positive, but this result was neutralized by another finding of an equally high rate of voluntary termination among new hires who tested negative; the study showed no significant relationship between the overall turnover rate and the drug test results.[1]

The Postal Service concluded that it could save approximately $4 million annually by refraining from hiring all applicants testing positive using the EMIT-100 test, and even more money by eliminating the presumably greater numbers who would test positive using the EMIT-20 test instead of the EMIT-100 test recommended by NIDA.[2]

Comments on the USPS Proposal

The Rehabilitation Act of 1973 prohibits the Postal Service from discriminating against employees and applicants for employment on the basis of physical or mental handicap.[3] The 1978 amendments to the Rehabilitation Act were intended to make the federal government a "model employer" of the handicapped.[4]

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1. United States Postal Service Office of Selection and Evaluation, "An Empirical Evaluation of Preemployment Drug Testing in the United States Postal Service, Interim Report of Findings," at 29, 31-38 (Jan. 1989)

2. Id. 39, 49-50.

3. 29 U.S.C. secs. 501, 504.

4. Prewitt v. United States Postal Service, 662 F.d 292, 301-2 (5th Cir. 1981) (comments of Sens. Cranston and Williams). 29 C.F.R. sec. 1613.703, which governs the Postal Service, provides:

"Agencies shall give full consideration to the

The governing regulations prohibit the Postal Service from using employment tests or other selection criteria that screen out or tend to screen out qualified handicapped applicants, unless such tests can be shown to be job-related to the specific position.[5] The same regulations require the Postal Service to make all reasonable accomodations to employees' handicaps that can be made without undue hardship.[6]

The statute and regulations establish, clearly and unequivocally, that the Postal Service cannot discriminate against job applicants on the basis of physical or mental handicap and that the Postal Service has, as well, an affirmative obligation to offer employment to qualified handicapped applicants.

The definition sections of the Act expressly define, as "handicapped individuals," alcoholics and drug abusers whose current use of alcohol or drugs does not prevent them from performing their job duties or threaten the property or safety of others.[7] In other words, the non-discrimination and affirmative

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hiring, plaacement, and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person."

5. 29 C.F.R. 1613.705(a).

6. 29 C.F.R. sec. 1613.704.

7. "[The term handicapped individual] does not include any individual who is an alcoholic or drug abuser

action employment obligations of the Postal Service apply to job applicants who are alcoholics or drug abusers able to perform the work without posing a threat to the health or safety of the rest of the workforce.[8]

The Postal Service's obligations to employ the handicapped -- including alcoholics and drug abusers able to perform their jobs -- is even greater once the applicant becomes an employee. As postal employees, alcoholics and substance abusers are entitled to participate in the Postal Service's Employee Assistance Program and to be granted leaves of absence to undergo rehabilitation.[9] The federal courts tell us that it was "Congress's firm intention," in enacting and amending the Rehabilitation Act, "to require federal employers to exert

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> whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."

29 U.S.C. sec. 706(8)(B).

8. Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226, 1231 n.8 (7th Cir. 1980); Davis v. Butcher, 451 F. Supp. 791 (E.D. Pa. 1978); Walker v. Weinberger, 600 F. Supp. 757 (D.D>C. 1985); Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1984), aff'd, 790 F.2d 964 (D.C. Cir. 1986); Johnson v. Smith, 39 F.E.P. 1106 (D. Minn. 1985); cf. Whitaker v. Board of Higher Educ. of the City of New York, 461 F. Supp. 99 (E.D.N.Y. 1978); Athanas v. Board of Educ. School Dist. 111, Highwood-Highland Park, Ill., 28 F.E.P. 569 (N.D. Ill. 1980).

9. See, e.g., Walker v. Weinberger, 600 F. Supp. 757 (D.D.C. 1985). There are limits on the duty to accomodate. The Office of Personnel Management was held to have no further duty to accomodate an alcoholic employee after granting extensive sick leave and counseling. Robinson v. Devine, 37 F.E.P. 728 (D.D.C. 1985). The Postal Service's Employee Assistance Program is described in its Employee & Labor Relations Manual, part 870.

substantial affirmative efforts to assist alcoholic employees toward overcoming their handicap before firing them for performance deficiencies related to drinking."[10] The same regulations impose the same duty toward drug abusers.[11]

In the absence of state handicapper statutes with provisions comparable to those of the Rehabilitation Act, private employers are, as a general rule, under no obligation to refuse to employ alcoholics and drug abusers. The same is not true of the Postal Service, however. It is clear, from the way Congress drafted its definitions, that it intended the Postal Service and other federal employers to serve as part of the solution to drug abuse problems in our society by providing employment to drug abusers who are reasonably employable. Congress defined employable drug abusers rather narrowly, as either former addicts or present abusers who are able to perform their jobs and pose no danger to the workforce. Applicants meeting these qualifications, and who

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10. Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1984), aff'd, 790 F.2d 964 (D.C. Cir. 1986); Walker v. Weinberger, 600 F. Supp. 757 (D.D.C. 1985).

If an employee can show that he is handicapped by a condition that can be accomodated, the burden of proof is on the agency to show that it cannot accomodate the employee. 29 C.F.R. 1613.704; Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983).

11. Davis v. Butcher, 451 F. Supp. 791 (E.D. Pa. 1978). The statutory definition of a person handicapped by alcoholism or drug abuse is such as to operate effectively to disqualify most current abusers. See, e.g., Heron v. McGuire, 803 F.2d 67 (2d Cir. 1986). On the other hand, however, an applicant is not automatically disqualified for federal employment because he is presently undergoing rehabilitation or other treatment. Healy v. Bergman, 609 F. Supp. 1448, 1455-6 (D. Mass. 1985).

are otherwise qualified to perform the job, are to be offered employment and all of the accomodations available to them as postal employees, including EAP counseling and the opportunity to undergo rehabilitation.

There can be no doubt that the Postal Service's proposal will cause it to run afoul of its duty to refrain from discrimination against, and its affirmative duty to employ, the handicapped.

The agency justifies its proposal to refuse employment to qualified drug abusers as a substantial money-saving measure. This justification is patently indefensible, in light of Congress' decision to require the Postal Service, as a federal employer, to assume the higher costs of employing such job applicants.

If the Postal Service is permitted to deny employment to qualified applicants who are drug abusers, it is likely that the taxpayers will ultimately pay for their support in some other way. Congress has decided, and we think it has decided wisely, that we will all ultimately benefit by paying higher postal rates for any higher costs associated with offering employment to such applicants than by denying them an opportunity to live useful and productive lives as wageearners.

We believe that the proper focus is on the quality of rehabilitation and counseling assistance offered to postal employees afflicted with drug abuse problems. A properly run employee assistance program, including rehabilitation services,

will cost more in the short run than purging all known drug abusers from the workforce. In the long run, however, effective rehabilitation and counseling services will save taxpayers the much higher costs of supporting unproductive drug abusers, either on welfare or in prisons. There is ample evidence, by now, of the long-term cost savings of effectively run employee assistance programs.

The Postal Service's EAP program urgently needs improvement, since the present program is largely ineffective. The most serious flaws in the present EAP are attributable to its being an "in-house" program. As any number of commentators have noted, an EAP program must be able to guarantee, absolutely, the confidentiality of the identities of program participants, so that persons who do not care to reveal their problems to their coworkers may take advantage of the EAP. An effective EAP likewise must be able to guarantee the confidentiality of all statement made by the participants to others involved in the program; such confidentiality is a fundamental requirement of any therapy program.

The Postal Service EAP lacks these most basic requirements of effective therapy. At the Detroit facility, the EAP office is located a few feet from a main work area. The identity of the program participants is a matter for the direct observation of the hundreds of workers in the vicinity of the EAP office. Even worse, it frequently happens that the substance of conversations in group meetings find their way to the workroom floor. This

latter problem is of course simply a function of the EAP's "in-house" character: all participants work at the agency, and it is just human nature for some of the conversations held in confidential group meetings to leak onto the workroom floor by way of other program participants. Unfortunately, the ensuing loss of confidentiality and privacy makes effective counseling virtually impossible.

Perhaps the most insidious aspect of the Postal Service's EAP is the frequent leaking of information about participants to their supervisors. The applicable postal regulations permit the disclosure of information about an employee's "continued participation and progress toward recovery" to referring supervisors or managers.[12] All too often, supervisors learn details regarding the nature of the employee's problems that go beyond simple reports on attendance and progress in the program. It is well known that such leaks occur, and employees are understandably reluctant to discuss their problems or personal lives with EAP counselors.

Given its operating problems, the program is ineffectual and only causes ill-will. It's a waste of taxpayer money.

The only effective way to eliminate these problems is to substitute a truly independent EAP for the present in-house program.

Additionally, an effective EAP must offer rehabilitation and treatment, as well as counseling. What the present program

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12. ELM, sec. 874.41(c).

offers is counseling only, by quasi-professional former addicts, along the lines of the Alcoholics Anonymous model. While useful, this counseling program is no substitute for detoxification or rehabilitation, when such treatment is needed. The Postal Service maintains referral lists for such services, but employees needing detoxification or rehabilitation are otherwise left to their own devices. They must take a leave of absence and make their own arrangements, including payment.[13]

We also believe that it makes good sense to refrain from the proposed drug testing as an objective matter of efficient operations and economics, without regard to the proposal's legal implications. Our position is shared by some of this country's most respected institutions. The American Medical Association, three years ago, studied the issue of whether drug tests should be required of civilian airmen. It recommended to the FAA that it would be wiser to test directly for signs of mental or physical impairment by measuring cognitive function. It concluded that pre-employment drug testing should be reserved only for jobs directly affecting the health and safety of others.[14] Today, three years later, advances in the technology for cognitive function testing make this option even more practical than it was when the AMA recommended it. Drug testing

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13. See, e.g., Agreement Between United States Postal Service and National Post Office Mail Handlers, art. 35.2 (1987-1990).

14. AMA Council on Scientific Affairs, "Issues in Employee Drug Testing," 258 JAMA # 15, at 2095 (1987).

simply cannot be rationalized as a check on performance impairment -- nor does the Postal Service seek to rationalize its proposal on such grounds.

Responding directly to the Postal Service's cost-saving rationale, and putting aside the legal and moral objections, even this rationale does not withstand closer examination. The Postal Service has calculated annual cost savings of about $4 million. Of this figure, $1 million must be subtracted, as the figure attributed to the savings for eliminating the estimated involuntary terminations associated with positive drug tests.[15] By the agency's own admission, the number of involuntary separations attributable to positive drug tests were neutralized by the number of voluntary terminations associated with negative drug tests. The selection and training costs that provided the basis for this figure are presumably roughly the same for all new employees, and thus these costs will be the same regardless of whether termination is involuntary or voluntary.

The estimated $3 million that the Postal Service attributed to the annual absenteeism costs associated with the positive drug tests must be weighed, of course, against the cost of the drug tests. Assuming approximately 10,930 new applicants annually (twice the figure reported for the six-month period of the study), the administrative, medical, and laboratory costs of testing are likely to approach $500,000 annually. The remaining asserted savings of $2.5 million is not, in our opinion, an

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15. See Interim Report, at 41.

excessive price to pay to transform approximately 918 otherwise unemployed and unproductive individuals into useful, taxpaying consumers.[16] We have made no effort to compute the savings in general assistance and other costs saved by removing such individuals from the welfare rolls that presumably would be their only other option.

There are other practical reasons to resist the temptation to institute pre-employment drug tests. All employers -- and there is no reason to exclude the Postal Service -- pay an enormous price in employee morale for using this draconian policing device. While some Fortune 500 companies have opted for pre-employment drug testing, the American Management Association found, in a survey that it conducted, that half of those presently requiring drug tests felt uncertain about whether it was an effective tool in dealing with workplace substance abuse.[17] "A surprising number of respondents, representing companies of all sizes, indicated that preemployment screening was intended as a statement of the firm's commitment to a drug-free workplace."[18]

One corporate vice president and general counsel has characterized drug testing as "a seductive gimmick that promises

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16. This figure is based on the 8.5 percent positive rate reported in the Postal Service's Interim Report and the application rate reported in the text.

17. American Management Association, Drug Abuse, the Workplace Issues 41 (1987).

18. Id. 42.

instant relief from the awesome responsibilities of management." He concluded that "it just doesn't work. Drug testing provides inaccurate and irrelevant information and alienates the vast majority of good employees."[19]

Conclusion

Post Office mailhandlers, more often than not, are veterans. Many of our members, unfortunately, are veterans who are struggling to overcome alcohol and drug addictions, while retaining employment in an occupation that has been identified as one of the most stressful. This country cannot turn its back on its veterans. Nor can we afford to turn our backs on the many others who may be able to salvage their souls if offered the opportunity. As a federal employer, the Postal Service has both a legal and moral duty to serve as a model employer by offering employment to alcoholics and drug abusers who can perform their jobs without endangering others.

As citizens and parents, we are all intensely interested in overcoming this country's current nightmare of drug abuse. But drug testing is not the answer. It is an easy matter for most determined users to evade detection, while we all pay too high a price, in the loss of mutual respect for each other. We implore this Committee, the Congress, and the Postal Service to find the strength to resist the current drug testing hysteria -- what Justice Scalia has called "a kind of immolation of privacy and human dignity in symbolic opposition to drug use."[20]

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19. L.L. Maltby, "Why Drug Testing Is a Bad Idea," Inc. 152, 153 (June 1987).

20. National Treasury Employees Union v. Von Raab ___ U.S. ___, (Mar. 21, 1989).

Mr. McCLOSKEY. Thank you, Mr. Berrien, for an excellent statement that quite frankly explored some aspects that had not crossed my mind nor had been brought up by any other person or group testifying today.

First of all, does your union have any history of approaching the Postal Service as to all the problems with the EAP program as far as confidentiality, leaks, efficiency, et cetera?

To his credit, Mr. Trosch is still here, and I know he is taking this all in.

Mr. BERRIEN. It is unfortunate, Mr. Chairman, that the elected leadership of this organization has basically been suppressed over the last three years from representing our craft. However, it is my understanding that the EAP program has constantly been under ridicule for its lack of confidentiality.

The reluctance of the responsible parties to administer our contract and take this matter before the U.S. Department of Labor, such as the APWU union has done, rather baffles us.

Mr. McCLOSKEY. From what you say, supervisors, people in management, and so forth, have a right to get—whether they have a right or not—information beyond simple progress, a statement of progress and participation. They can get into personal problems, very sensitive information about individuals?

Mr. BERRIEN. Exactly. The confidentiality and the record maintenance in both the EAP offices and the medical unit is rather deficient, in our opinion. It is very carelessly handled and individuals such as supervisors and managers indeed have more access than just an employee's participation level or attendance.

It goes as far in depth as the exact ailment, the nature of drugs the employee has been using, and his meeting participation, whether or not he is hostile, et cetera. We believe that they exceed the purview of what a supervisor essentially needs to have when we are trying to protect one's participation and the confidentiality of it.

Mr. McCLOSKEY. You talked about Detroit—and this has come up in previous testimony—but would you say more often than not these EAP offices are right there on the floor, and it is kind of like public record as to whether you are having problems or not.

Mr. BERRIEN. Exactly. Detroit was only a principal example on this occasion. But as in most, if not all of the U.S. Postal Services facilities, at best the EAP office may be on another floor. But, nonetheless, when your supervisor comes down to give you permission to go up there, if he does not go around and gossip it to the other workers as to where you are going, you are lucky.

Mr. McCLOSKEY. What do you think of the suggestion previously stated that the interested unions, employees and management groups get together? Maybe I could just be in there as a catalyst or something to toss these problems around. The EAP, enforcement, confidentiality, et cetera.

Mr. BERRIEN. We would feel privileged, Mr. Chairman, to participate in such a meeting. I am sure the fruits of all our minds could come up with a more constructive program than the existing EAP.

Mr. McCLOSKEY. I take it you do not like pre-employment drug testing. How would you prefer it be handled? Should it be a matter of a constitutional sanction or is this something the different

unions should be bargaining, resulting in different standards and degrees of participation——

Mr. BERRIEN. Indeed, I would say it falls within the auspices of a negotiating item. The drug testing criteria must not be based on the mere fact of detection. It must exceed that scope. It must venture off into whether or not an employee can reasonably perform a specific job without endangering himself or others or causing the loss of property.

If those entities aren't looked into, we believe the individual is being done an injustice and society is catching the trickling effects.

Mr. MCCLOSKEY. Do you know of any studies which have validated drug screening as a predictor of on-the-job performance?

Mr. BERRIEN. Yes. I would like to refer that to our special counsel, Ms. Barbara Harvey, for specifics.

Ms. HARVEY. Mr. Chairman, in fact, there is another study. It was very recently reported in the literature. I would be happy to supply the Committee with a copy.

The study was done by Dr. David Parish, a medical doctor and an academic as well. It was published this past January and February in the Journal of General Internal Medicine. Dr. Parish did a study of the question of whether pre-employment drug testing serves as a predictor of job performance. This was a truly objective test.

He concluded that—and I will quote his conclusion—"We found no significant difference between individuals who tested positive and those who tested negative using broad categories of job performance."

The data presently available do not support the thesis that positive drug screening predicts poor job performance. In fact, we submit that if the Postal Service's data had been adjusted by standard statistical methods using multiple regression analysis, it would have been adjusted for other factors that also correlate to a statistically significant degree with both absenteeism and involuntary terminations. A number of other factors also correlate with both.

We believe the Postal Service has the data to come up with those statistics, and we ask that the Postal Service come up with the data that is properly adjusted.

Mr. MCCLOSKEY. Thank you. We are getting real pressures to move this hearing along. We have to be out by 12:45, and we have two more witnesses. I have just three real quick points, Mr. Berrien.

As we have all talked several times, people are going to know that if you apply for a Postal Services job, you are going to have to take this test. What does that mean in the long-run as far as the efficacy of this fairly expensive process and for the alleged efficiency that the Postal Service says it would induce?

Ms. HARVEY. I believe, Mr. Chairman, that it will mean nothing in the long-run because it is an easy matter, for anyone who is determined to do so, to evade the test in many different ways.

It has been pointed out by people who are knowledgeable that the only serious drug test is one which is unfortunately performed under the direct observation of an observer, which we believe would be completely unconstitutional.

Given that fact and the fact that it will become well-known that a drug test is part of the application process, people will simply refrain from using drugs before they take the test.

Mr. McCLOSKEY. I find one aspect of the testimony that was very interesting to me and a little bit educational. Quite frankly, from Mr. Berrien, is a statement that the Postal Service—and I guess you would say any employer—has an affirmative responsibility to hire qualified drug abusers.

I have been trained in the law, and I see your point. No doubt you can cite the cases. But assuming that is the case, do we know what the Postal Service is doing implementing this policy which evidently could have statutory as well as constitutional problems?

Ms. HARVEY. The statute prohibits discrimination against handicapped individuals, and it does define drug addiction as a handicap. Now, only persons who are former addicts, as a practical matter, are likely to qualify under the statutory definition, as well as any current addicts who do not pose a threat of any kind to either property or other people and who can perform their jobs.

Mr. McCLOSKEY. But you are saying that current addicts, as long as it was not job impairing, would have to be qualified. So if you are a regular marijuana or cocaine user, I guess you are saying you ought to be hired and allowed to sort the mail rather than drive the forklifts. Right?

Ms. HARVEY. We are, as we stated in our testimony, utterly opposed to drug use on the job.

Mr. McCLOSKEY. Oh, I understand that.

Ms. HARVEY. But someone who is fully qualified to perform the job is qualified to be employed to do the job. If it is discovered that that person has a drug abuse problem, then the proper approach is to use employee assistance programs that are in fact effective.

Mr. McCLOSKEY. But I guess you would be saying then that if the Postal Service were to turn away everyone who tested positive for drugs, they would have a hell of a legal problem on their hands.

Ms. HARVEY. That is correct. Unless Congress changes the statute, that is correct.

Mr. McCLOSKEY. Again,I am laying those legal opinions on Mr. Trosch's back. This is another area in which I would appreciate hearing from the system and its lawyers.

We have talked about compassion, saving people's lives, saving people's souls, Mr. Berrien. How about saving society? When do we get a right to clamp down on abuse of drugs in the workplace with terminations, criminal sanctions?

Generally speaking, would you say any case of on-duty dealing of cocaine or heroine could justly result in a termination once it is posted on the board and everybody knows those are the rules of the game?

Mr. BERRIEN. Well, it is our understanding that the contract "just cause" criteria would indicate that that indeed would be a valid reason to dismiss employees with those unfortunate characteristics.

Mr. McCLOSKEY. Right. Well, I appreciate hearing that. It is very helpful.

Would you have anything to add? Wonderful testimony. I really appreciate it.

Mr. BERRIEN. No, Congressman. It is a privilege to come before you today and give our views. Of course, we will reiterate that we are indeed opposed to the drugs in the workplace.

It is a most unfortunate situation and it is indeed a heavy burden that Congress has bestowed upon the Postal Service, to have an ultimate responsibility towards attempting to rehabilitate some of the employees and rid the long-term burden that society would reap if we essentially threw them to the wolves.

Mr. MCCLOSKEY. I wish you every success in your new position.

Mr. BERRIEN. Thank you, sir.

Mr. MCCLOSKEY. Thank you very much. Mr. Joseph Amma, the Director of Contract Administration for the Mail Handlers Division of the Laborers' International Union.

It appears your statement is very short, Mr. Amma; and given the time, that is most appreciated. We will accept it for the record. Please proceed as you like. We probably have about seven minutes.

STATEMENT OF JOSEPH AMMA, DIRECTOR OF CONTRACT ADMINISTRATION, MAIL HANDLERS DIVISION, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, ACCOMPANIED BY VITO RUSSO, DIRECTOR OF EDUCATION AND TRAINING; AND CLAUDIS S. JOHNSON, DIRECTOR OF EDUCATION

Mr. AMMA. All right, Mr. Chairman. I will read my statement into the record.

Mr. MCCLOSKEY. That is not because I am not interested in talking to you for hours. They are throwing me out of here at 12:45.

Mr. AMMA. We understand that and we thank the chair for the indulgence of the Committee.

My name is Joseph Amma and I am here today as the representative of the Contract Administration Department of the National Postal Mail Handlers Union, a division of the Laborers' International Union of North America, AFL-CIO.

I am here as a spokesman on behalf of General President Angelo Fosco of the Laborers' International Union of North America, who is the official spokesman on these types of issues. I am accompanied by Dr. Vito Russo who is the Director of Education and the alcohol and drug specialist for the International Union, and by Mr. Claudis Johnson who is the Education Director for the Division.

The Mail Handlers Division of the Laborers' International Union represents more than 50,000 employees.

We thank you for the opportunity to present our union's views on the U.S. Postal Service's pre-employment drug testing programs.

Mr. Chairman, I want to begin by stating that, like virtually all Americans, we strongly oppose the sale and use of illegal drugs and the abuse of substances such as alcohol that are legal. We do not think substance abuse has a place on or off the job.

Having said that, we do want to point out that the National Postal Mail Handlers Division of the Laborers' International Union is opposed to any form of mandatory drug testing on our members or potential members for the following reasons.

First, we think mandatory drug testing is unconstitutional because it subjects Americans to unreasonable searches and invasion of their privacy.

Second, since we have never negotiated the subject with the U.S. Postal Service, we think imposition of mandatory drug testing on our members or potential members is a violation of our collective bargaining agreement. Under the terms of our contract, wages, hours, working conditions, and much more, are subject to collective bargaining and have been for nearly 18 years.

We believe it is mandatory for the Postal Service to negotiate with us over whether there should be pre-employment drug testing, and if we agreed to that concept, how it should be implemented.

Third, we believe it calls for an implementation of mandatory drug testing of postal and federal employees are nothing more than a political smoke screen. Our government has failed to stop the illegal drug trade. It does not have enough personnel or ships to patrol our coasts and search suspicious vessels. It does not have enough clout with the foreign nations where the drugs are grown or processed to force them to police themselves. And, even worse, it apparently has made deals with foreign dictators who are up to their necks in the drug trade.

Since the government cannot or will not stop the flow of illegal drugs into our country, and thinks it can trick us into believing it is doing something about drugs by going after the relatively few postal or federal workers who may be drug users.

Mr. Chairman, we are worried about the constitutional issues raised by mandatory drug testing. We are aware, of course, of the U.S. Supreme Court's recent ruling that it is constitutional to check certain federal law enforcement employees and public transportation workers for drugs. Frankly, while we can understand that ruling, it worries us too.

In the absence of proof that an individual is actually using drugs, in the absence, therefore, of probable cause, how can the government justify the incredibly intrusive process of requiring an employee, or even a prospective employee, to provide blood or urine samples. And what would be the next step?

We have all read of the female military officer who resigned from the service not to avoid a drug test but to avoid having to urinate in the presence of another person so that the sample could be sacrosanct. Is that what postal and government employees will be asked to do in the near future? Go into a room to urinate while a supervisor watches?

The Postal Service's program to drug screen job applicants is irrational and a waste of money. If an applicant refuses to take the test, he or she will not be considered for employment. If the applicant takes the test and flunks, he or she may still be hired.

We have seen documentation indicating that the Postal Service has in the past taken on a number of new hires who tested positive and did not even send them in for counseling in its Employee Assistance Program. Apparently the attitude is: we know you are a drug user, but we do not care.

Pre-employment drug tests are more unreasonable and more of an invasion of privacy and probably no more an accurate predictor of on-the-job behavior than the so-called lie detector tests that used to be imposed on millions of American job seekers. As we know, the Supreme Court ruled that polygraph tests could not be required of most job applicants. We believe that eventually the Court

will make a similar ruling regarding pre-employment drug testing for most jobs.

The Postal Service has not made available to us its rationale for requiring pre-employment drug screening or its methodology for analyzing the results. Is the Postal Service trying to determine whether an employee will be impaired on the job? The drug tests being used will not tell it that. As far as we know, it does not predict behavior on the job.

Has the Postal Service any legitimate scientific studies correlating its pre-employment drug testing with job performance? We have not seen any. Is there a legitimate study the Postal Service can point to that indicates positive blood tests mean more absences from the job? We have not seen it.

How accurate are the medical laboratories contracted to do the analysis for the Postal Service? We have seen reports that indicate that many of the labs have very high error rates.

Mr. Chairman, we would all like to see the sale and use of illegal drugs eliminated. For political and budgetary reasons, perhaps, our federal government doesn't seem to be able to do that job. Instead, the government goes after job applicants and employees already on its payroll. That way it can say it is doing something about drugs.

We do not think this is a rational approach. We think it unconstitutional and we think it is a violation of our labor agreement with the Postal Service.

Mr. Chairman, we thank you kindly for the opportunity to testify here today. We would be glad to respond to any questions, and I would like to give Dr. Russo an opportunity to add any comments to the record that he would care to at this time.

Dr. RUSSO. If I may, Mr. Chairman, the one issue that I did not hear this morning by any of the other presenters in terms of measurement in the drug testing was the measurement of recency of use. We heard a great deal about does the drug testing measure impairment and we learned from that it does not.

But, also, you aptly stated that when a person has six Heinekens on a Sunday and reports to work the next day maybe anesthetized and maybe somewhat foggy, maybe he will run a forklift through a wall. But there is no test for that.

However, a 25-year-old young man or woman, as part of their social mores, may have taken a marijuana or a joint two weeks prior to the test, and that person may report to work bushy-eyed and full of vim and vigor, but cannot work because he has come up positive and is refused employment.

[The following letter was received for the record.]

ANGELO FOSCO
General President

ARTHUR A. COIA
General Secretary-Treasurer

ROBERT J. CONNERTON
General Counsel

Ledger Diamond, 1st Vice President
Walter Freiling, 2nd Vice President
Ugo Rescini, 3rd Vice President
Mason M. Warren, 4th Vice President
R. P. Vinell, 5th Vice President
John Serpico, 6th Vice President
Herbert Labdell, 7th Vice President
Louis Brave, 8th Vice President
Vere O. Haynes, 9th Vice President
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April 26, 1989

MAY 2 [illegible]

Rep. Frank McCloskey, Chairman
Subcommittee on Postal Personnel
and Modernization
Committee on Post Office & Civil Service
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

In order to complete our submission for the record on Drug Testing Policies in the U.S. Postal Service (U.S.P.S.), I am submitting the attached for inclusion. This analysis amply demonstrates the inadequacy and deficiency of the conduct of the U.S.P.S. "survey" and amplifies some of our concerns.

Thank you for your attention to this matter. If at any time you would like testimony regarding matters affecting the mailhandlers bargaining unit at the U.S.P.S., please contact me.

Sincerely,

Angelo Fosco

ANGELO FOSCO
General President

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enc.

MEMORANDUM

TO: Angelo Fosco, General President

FROM: Dr. Vito Russo, Director of Education

SUBJECT: An Analysis of the Empirical Evaluation Study For the United States Postal Service

DATE: April 26, 1989

There are at least three major issues that require comment and criticism in the U.S. Postal Service study entitled: An Empirical Evaluation of Pre-employment Drug Testing in the United States Postal Service: Scientific issues, Ethical issues and the conclusions drawn.

Scientific

At first glance the study conducted seems to employ a relatively good methodology. However, as one scrutinizes the details of the study, certain questions arise. Information has been presented by outsiders suggesting the purpose of the study was not to objectively analyze the impact of positive drug screens on employee performance but instead to provide evidence for future defense to legal challenges. This certainly introduces a certain degree of experimenter bias.

Not all data seems to be presented in the present report. The suggestion has been made that such information as accident rates, injuries, claims and discipline were also analyzed. If this information was analyzed, it should appear in the findings, otherwise it can be concluded that it is being withheld. If it was not analyzed, then why not? Certainly these variables are also important in determining the effects of substance abuse in the work place.

Statistical analyses seemed to be valid, however, other forms of analyses may have also been used with differing results. The use of a multiple regression format taking into account such variables as age, sex, previous substance abuse treatment, previous psychiatric treatment, previous medical condition, socioeconomic

status, and type of job being hired for would seem to be able to make more sense since it would allow for estimating the relative contribution of each variable to the predictor variable or variables. It may be that absenteeism is also related to involuntary turnover. Utilizing multivariate multiple regression techniques in which there are two predictor variables may be a more valid statistical approach.

Another issue is base rates. The real question that needs to be addressed is the degree to which the variables differ from the base rates not from zero. It is necessary to determine the overall base rate of absenteeism and turnover for the entire postal service and then compare rates of turnover and absenteeism to those base rates.

There is also a finding in the analyses of absenteeism which is not logical. Significance was established when comparing the none and moderate category for those who tested positive for marijuana. This suggests that there is a higher rate of moderate absenteeism for those with positive drug tests for marijuana than those with negative drug tests. The lack of logic is in the next nonsignificant finding in which negative and positive drug test individuals were not different in the frequency of heavy absenteeism.

In other words, if one is positive for marijuana, it supposedly predicts that one can expect a high rate of moderate absenteeism but the same level of heavy absenteeism should be expected whether there is a negative or positive drug test. If marijuana was the major contributor to absenteeism, one would expect that this significant contribution would be present in the heavy absenteeism category as well as the moderate category.

It is likely that a postal management official will interpret the results in the following manner: if a postal worker is absent at a rate which puts him in the moderate category, one should suspect marijuana use; however, if he is absent in the heavy category, we must suspect other reasons. This does not seem logical, especially since the category of absenteeism depends upon the length of time absenteeism is measured. All individuals who are in the heavy absenteeism category likely passed through the moderate category, therefore, from a practical point of view it is impossible to conclude that marijuana is the sole reason for the absenteeism.

Ethics

It is likely that the present study would have some difficulty passing through a human subject's review process. It is not stated whether such a process took place for this study. The difficulty from a human subject's review procedure would come from three major sources: The potential for harm, compliance with confidentiality regulations, duty to inform and debrief subjects. At no point in the report is the method for informing the subjects of the study and its results stated.

There is a statement on the Personal History Form entitled the "Privacy Act Statement" which basically states that an individual is part of a study and does not have to participate, but nonparticipation may reflect negatively on the individual. No statement is contained in the report which guarantees the confidentiality of results. With respect to the potential for harm, there are at least two areas in which harm may be caused and there is no warning of such harm. Specifically, psychological harm may come from the embarrassment of the urinalysis procedure itself, and secondly, it seems that when an individual is found to have a positive finding, and when that individual's job is in jeopardy, there is a moral and ethical obligation to offer intervention particularly since the experimenters have been observing the individual's downfall from the time of application.

If the experimenters were looking to see the effect of a positive HIV test on work performance, would they withhold the results as they observe the individual develop the telltale signs of AIDS and allow the individual to be fired for high rates of absenteeism and continue to withhold these results and not offer any assistance? It is important to keep in mind that there is the Rehabilitation Act of 1973, which prohibits discrimination on the basis of physical or mental handicap and this includes substance abuse. It seems that to allow a postal worker who is hired with a known positive drug screen become involuntarily discharged, is discrimination on the basis of substance abuse since it is the assumption and bias of the postal department and its experimenters that involuntary turnover is a direct result of substance abuse.

Conclusions

The report concludes that the analyses conducted indicates that a positive drug screen is related to absenteeism and involuntary turnover. There may in fact be a relationship but the critical question is the amount of variance that is accounted for by that relationship; and is that amount of variance worth violating the privacy of all job applicants; and is it enough to make accurate predictions that would allow the postal service to reject certain applicants. At no point in the report is the issue of job performance addressed.

Although some studies, utilizing sophisticated cognitive tests, have shown some effects of marijuana a day after use the vast majority of studies do not demonstrate a relationship between the presence of a positive drug test and work performance. Another important issue not addressed by the study is the vast majority of applicants with positive drug tests were in fact good employees. Should a drug screening policy take effect and the EMIT 20 be used to eliminate applicants, then approximately 75% of the individuals who would have been good employees will be eliminated from working for the postal service.

With respect to cost it is important to note that, given the relatively low drug abuse implication of the statistics presented in the report, it will be far more costly to implement a drug screening policy for all job applicants. Much less costly techniques with more positive ethical and moral implications are available.

For example, a union supported employee assistance program or membership assistance program will cost much less than drug testing programs. Pre-employment drug screening is only the first step. If management feels this is a positive policy, it is only a matter of time before random drug testing or drug testing without probable cause occurs. This will add more cost, reduce morale, probably violate the Rehabilitation Act of 1973 and ignore more effective approaches to substance abuse in the work place.

A final comment is related to the "hysteria" that seems to be a part of discussing drug abuse in the work place. This study and evidently officials at the postal service have completely ignored the two most serious addictions present in the work place: Alcohol and tobacco. Both of these substances have dire consequences in the work place and are significantly more popular than any other drugs of abuse. It is likely that of the 4,950 applicants who had a negative drug test, at least 800 were experiencing alcohol problems. Of the new hires, at least 600 were probably alcohol troubled. Add to those numbers those who are also addicted to tobacco.

Mr. McCLOSKEY. Thank you very much, gentlemen. I would like to pursue this further, but we ought to give our last person appearing at least the courtesy of four or five minutes. We will talk again. I think we are just starting on this.

I would appreciate your positive participation at future meetings. Thank you very much.

Mr. AMMA. Thank you, Mr. Chairman.

Mr. McCLOSKEY. Ms. Janlori Goldman, Staff Attorney for the American Civil Liberties Union.

I apologize for the brevity in which we are going to be forced to compress your testimony. I did read your statement in detail, and it is an excellent statement. Please proceed as you like.

STATEMENT OF JANLORI GOLDMAN, STAFF ATTORNEY, AMERICAN CIVIL LIBERTIES UNION

Ms. GOLDMAN. Thank you, Mr. Chairman. My name is Janlori Goldman. I am a staff attorney at the ACLU.

What I would prefer, since we do have limited time, is to have my statement entered into the record. I will not even bother to summarize my remarks.

[The prepared statement of Janlori Goldman follows:]

STATEMENT OF

JANIORI GOLDMAN

STAFF ATTORNEY

AMERICAN CIVIL LIBERTIES UNION

On behalf of the American Civil Liberties Union, I would like to thank you for inviting me here today to testify on the United States Postal Service's pre-employment drug testing program.

The recent and very real national concern about drug use has often led to extreme and inappropriate measures to solve the problem. Drug testing of an entire group of people, with no documented history of abuse and with no reason to believe that the individuals are impaired at the time of the tests, is such a measure. Pre-employment drug testing can do nothing to gauge a person's ability to perform a particular job, nor can it calculate impairment at the time of the test.

Efforts to combat increasing drug use in this country need not, and should not, cost people the loss of their privacy, dignity, reputations and jobs. Public resources would be better used by avoiding publicity stunts that needlessly undermine the rights of prospective government employees. As Justice Scalia warned in his dissent to the Supreme Court's ruling last month upholding testing of certain Custom Service employees: "[T]he impairment of individual liberties cannot be the means of making a point." Attention should be focused on measures designed to truly address the drug problem in this country.

The recent Supreme Court rulings on drug testing should be read as closing the door on the government's attempt to institute widespread mandatory, random drug testing of the federal

workforce. The Court upheld drug testing in two very narrow contexts and with stringent procedures: the post-accident urine and blood testing of railway workers to determine the possible cause of the accident; and the pre-promotion testing of Custom Service employees who are directly involved in drug interdiction and/or carry firearms.

The ACLU does not agree with the Court's interpretation of the Fourth Amendment requirements in these cases, but we do believe that they can not be read to sanction random drug testing. We are concerned today with the government's testing of each person who applies for a job with the U.S. Postal Service. The Postal Service's testing program certainly does not comport with the standards under which the Court permitted suspicionless drug testing. The Postal Service has neither demonstrated a long-standing history of drug use or abuse in the agency nor has it targeted its testing program at prospective employees in highly sensitive positions that involve public safety.

The ACLU urges this Subcommittee to press for legislation prohibiting the Postal Service from continuing to drug test all applicants for employment. In addition, we urge Congress to pass legislation prohibiting across-the-board, mandatory drug testing of government employees and prospective employees. If drug testing is to be allowed at all, it should be in narrowly circumscribed instances with stringent due process, accuracy and privacy safeguards in place.

Our testimony today outlines the ACLU's position on drug

testing, summarizes the Postal Service's drug testing activities, discusses the Postal Service's drug testing program in light of the two recent Supreme Court decisions on the testing of certain federal employees, and suggests Congressional action that is both within Constitutional bounds and good public policy designed to truly address the problem of drug use in the federal workforce.

ACLU OPPOSITION TO MANDATORY DRUG TESTING

The ACLU opposes mandatory, across-the-board drug testing as a violation of an individual's constitutional right to be free from unwarranted searches and seizures by the government. Reasonable, individual suspicion should be a prerequisite for any mandatory testing program. In addition, the use of drug test results, particularly to make adverse employment decisions, must be narrowly tailored in light of the limited probative value of the tests and concerns for privacy, confidentiality and fairness in the process. The employer must be able to demonstrate that off-duty, off-premise use of drugs directly affects the employee's ability to satisfactorily perform his or her job. Given that drug testing is intrusive, ineffective and prone to error, the ACLU believes that mandatory testing is not only unconstitutional, but an inappropriate and unnecessary way to deal with workplace drug use.

The ACLU opposes pre-employment drug testing by the Postal Service as a violation of the applicants' Fourth Amendment right to be free from unwarranted government searches and seizures. The

Supreme Court has recently ruled that government-compelled drug testing intrudes upon the privacy of an individual and is a search under the Fourth Amendment. Further, a potential employee may not be required to forego his or her constitutionally protected rights to gain the benefit of government employment. (Thorne v. City of El Segundo, 726 F.2d 459,469 (9th Cir. 1983).

THE POSTAL SERVICE TESTING PROGRAM AND VALIDATION STUDY

In January, 1989, the U.S. Postal Service began pre-employment drug testing of all postal service applicants in eleven cities. The Postal Service is the first government agency to institute across-the-board drug testing of applicants and to condition employment on the results of the tests. The Postal Service has yet to make public the procedures it uses in conducting the pre-employment testing. The testing is estimated to cost $2 million.

At the same time, the Postal Service is engaged in an ongoing "validation study" that involves hiring known drug users and monitoring their work performance over a period of time. The stated purpose of the study is to link pre-employment drug use to workplace problems, thereby creating a basis for defending lawsuits against its drug testing activities. Postal Service officials conceded that their intent in conducting the study is to use the study results to justify drug testing.

The grounds of the study, and the manner in which it is conducted, have been criticized as unscientific and unethical. It

is particularly distressing that the agency is engaging in a study with a preconceived result in mind. In an October 13, 1987 letter to then-Postmaster General Tisch, this Subcommittee's Chairman wrote: "I have a number of concerns and strong reservations about this study, the need for it and its validity. I feel this study is highly questionable because running a test with the preconceived intent to use the 'evidence' for future defense to legal challenges appears to taint the impartiality needed for true scientific experiments." Concern has also been expressed about the contradiction between the Postal Service hiring known drug users and the Service's statements that such employees "contribute to accidents on the job" and pose a "serious health and safety hazard to employees as well as customers."

The Postmaster General did not reveal the existence of the study during oversight hearings in this Subcommittee two years ago. The study was disclosed by a local reporter who found the study was being conducted without the knowledge of those being tested or monitored. Due to the study's lack of scientific controls and the biased manner in which it was conducted, we believe the Postal Service should not rely on the study to buttress its pre-employment testing program.

Drug Testing Is Ineffective And Unjustified

The Postal Service's rationale for its drug testing program is without any documented basis and will be ineffective in

improving workplace safety. In a letter to Union Presidents last year, Assistant Postmaster General Joseph J. Mahon, Jr. asserted that:

> The need for this [drug testing] program is precipitated by the damaging effect of illegal drugs to the health and safety of individuals and to the workplace... [D]rugs in the work environment contribute to accidents on the job, increased unscheduled absences, decreased productivity, and are a serious health and safety hazard to employees as well as customers.

The Postal Service has failed to offer any evidence indicating that drug abuse exists within the agency, or that drug abuse within the agency has contributed to threatening public safety or national security. Without such a showing, the Postal Service's dragnet approach to identifying drug users among applicants is wholly unjustified.

We agree with the laudatory goals of public safety and reducing on-the-job drug use, but pre-employment drug testing will not accomplish these aims. An across-the-board pre-employment testing program ignores the limited probative value of urinalysis test results for any evaluation of an individual's capability to perform a particular job. The limited value of the test significantly undercuts any purported goal of weeding out or identifying potentially impaired applicants. A "positive" drug test has no predictive value regarding impairment in job performance or current drug use. At best, these tests may indicate prior exposure to drugs, which may have occurred days or weeks before the test. Drug testing, especially in the pre-employment context, is ineffective in advancing public safety.

Contrasted with the potential harm to individuals, the benefits to be derived by the Postal Service testing program are minimal, and more likely, illusory.

Drug Testing Is Highly Intrusive

The drug testing process is inherently intrusive into an individual's privacy and bodily integrity for two reasons. First, it subjects an individual to an offensive and degrading process:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a private function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom. (Skinner v. Railway Labor Executive's Assn., 87-1555 (1989), citing National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (1987)).

Second, drug testing jeopardizes privacy by subjecting individuals to the involuntary disclosure of personal medical information that is a necessary by-product of the testing process. This information, often irrelevant for employment purposes, may "provide government officials with a periscope through which they can peer into an individual's behavior in her private life, even in her own home. . . ." Jones v. McKenzie, 833 F.2d 335, 339 (D.C. Cir. 1987).

Both of these forms of surveillance unreasonably intrudes into an individual's privacy, particularly when measured against the ineffectiveness of the tests. It is our understanding that the Subcommittee has not yet been informed of how the Postal Service conducts its drug testing program. Clearly, direct supervision of employees during urination is most intrusive, but

even if the employee is allowed to produce the sample unobserved, privacy interests are still implicated by the compulsory process and the involuntary disclosure of sensitive medical information.

Government-compelled drug testing could cause irreparable harm to individuals through humiliation, loss of dignity, damage to reputation, loss of employment, and the stigma that attaches to a "positive" test result.

RECENT SUPREME COURT DECISIONS

It is highly unlikely that the Postal Service's sweeping pre-employment screening of applicants is constitutional under the standards implied under the Supreme Court's recent decisions upholding two drug testing programs. The Court held that drug testing by the collection of blood, urine and breath is a Fourth Amendment search that "intrudes upon society's expectations of privacy." The Court went on to uphold drug testing of individuals directly following a serious railway accident and of individuals directly involved in drug interdiction or carry firearms. The Court remanded for further review a Customs Service program to drug test employees who handle sensitive information.

In one of the cases, Skinner v. Railway Labor Executives' Association, the Supreme Court interpreted the Fourth Amendment to authorize the drug testing of railway employees involved in a serious accident. Drug testing without a warrant or particularized suspicion of drug use was upheld in this instance because the Court found the searches to be "reasonable," the

standard it applied to non-criminal warrantless searches.

The Court determined the testing in Skinner to be reasonable, but only after finding that: 1) the railway industry is pervasively regulated due to special safety-sensitive needs; 2) there is a long-standing, well-documented history of alcohol use by railroad employees; 3) post-accident drug testing will help the government determine the cause of an accident; and 4) when balanced against these compelling government interests in regulating the industry, the employees' expectations of privacy are outweighed. The Court did recognize that privacy interests are implicated by the intrusive process of collecting a sample, and the ensuing analysis, which can reveal a great deal of sensitive medical information.

It is important to note that the railway industry, with the greatest documented use of alcohol and alcohol-related accidents, has adopted the most narrowly tailored drug-testing scheme. Testing may be done only after a serious accident, under carefully controlled circumstances, and both urine and blood tests are administered to ensure accuracy and relevance. Further, tested employees receive notice of their test results, and may submit a written response before the final investigative report is prepared. Employees who refuse to be tested are entitled to a hearing to explain their refusal.

Even in these narrowly circumscribed instances, Justices Marshall and Brennan were not persuaded that warrantless drug testing is constitutional. In his dissent in Skinner, Justice

Marshall warned: "Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."

Clearly, the ruling in Skinner can not justify the Postal Service's drug testing program. Arguably more relevant is the other opinion handed down on the same day in which the Court upheld, 5-4, a Customs Service drug testing program. However, even under this ruling, the Postal Service's program is not justified.

In National Treasury Employees Union v. Von Raab, the Court upheld the Custom Service's drug-testing program based on the tested employees' direct involvement in drug interdiction and/or a requirement that they carry firearms. The Court found that drug testing does invade reasonable and constitutionally-covered expectations of privacy, but that the intrusion in this case "serves special governmental needs," based primarily on a finding that:

> [t]he Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population. ... In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Service's policy of deterring drug users from seeking such promotions cannot be deemed unreasonable.

However, even after acknowledging these substantial concerns, the Court refused to uphold the drug testing of employees who handle

sensitive or classified information, finding the category too broad, vague and unreasonable in scope and remanding for further fact finding.

The Court in Von Raab noted the narrowness of the testing program and the procedural protections in place. Only employees who have been tentatively accepted for promotion to covered positions are tested. Employees are given advance notice of testing, they are not observed during urination, and samples are only tested for specific drugs. Two different urine tests are used to enhance the accuracy and relevance of the results.*

The Postal Service's pre-employment testing program does not meet the standards approved in Von Raab. The Postal Service program covers all applicants for employment, regardless of the requirements of the position. Even if the testing were confined to a certain group of applicants, the Postal Service would be hard-pressed to show that any position be characterized as "special-needs" or "pervasively regulated," either involving drug interdiction, or implicating national security and public health and welfare.

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* A narrow majority prevailed in Von Raab, with Justice Scalia issuing a vigorous dissent, labeling the Custom Service rules an "immolation of privacy and human dignity in symbolic opposition to drug use." Justice Scalia found that Service's testing program did not comport with the Fourth Amendment requirement that all suspicionless searches must be reasonable because: 1) the Custom Service had not demonstrated any drug problem among the targeted class of employees; and 2) the Service failed to show a connection between any grave harm and drug use. "Speculation, and not very plausible speculation" is not enough to justify the substantial intrusion into a person's privacy, Justice Scalia concluded.

CONGRESSIONAL RESPONSE

The ACLU believes that drug testing, pre-employment or otherwise, is intrusive, prone to error, and inappropriate to deal with workplace drug abuse. Surely an employer who observes an employee using drugs in the workplace or determines that an employee is working while under the influence of, or impaired by, drugs in the workplace, does not need a urine test result to take disciplinary or remedial action against the employee. In fact, in such circumstances a urine test requirement would add no additional validity to any action that an employer might take and could instead become an aggravating factor in the necessary communication with the employee that must follow.

Objective criteria comprising a reasonable individualized suspicion of drug abuse are well publicized. For example, the Department of Education's 1986 publication, School Without Drugs, contains a "Fact Sheet" on 'Signs of Drug Use'; the September, 1986 issue of Drug Abuse Update contained an excerpt from a publication by Dr. Forrest Tennant, a well-known advisor to the National Football League, regarding 'How and When to Suspect Drug Use in an Athlete'; and 800 - Cocaine, a book by Dr. Mark Gold, the founder of the National Hotline for Cocaine Users and Victims, contains information about the signs to look for in recognizing cocaine use on the job.

Managers, supervisors and hiring personnel can be clinically trained to recognize the behavioral, performance and physical

symptoms of drug abuse in a more effective, and less offensive manner than drug testing. They may not be able to readily detect each and every individual with a drug problem, but neither will urine testing. Through personal and professional interaction with their employees, they will have a daily picture of the workforce and a greater ongoing knowledge of their employees that will help them to be aware of the changes in behavior and performance that mark the drug abuser.

Another alternative to drug testing that is likely to be more effective and less intrusive is impairment testing, using computer-assisted neurophysiological techniques. If the federal government is seriously concerned about protecting public safety, it would recognize that poor performance can be caused by a wide variety of factors, and that it is more important to measure overall impairment than just one possible cause for the reduced performance.

It is imperative that drug testing activities by the federal government should not be left to the rulemaking discretion of individual agencies, particularly given the necessity of safeguarding the privacy and due process rights of individuals. If Congress is going to authorize any drug testing program, it should pass legislation that mandates detailed confidentiality, chain of custody, privacy and lab certification procedures. In addition, a cause of action for wrongful adverse employment decisions based on test results should be provided to individuals.

We urge Congress to enforce the mandatory laboratory certification guidelines promulgated by the Department of Health and Human Services (HHS) last year, and to pass H.R. 33, legislation introduced earlier this year by Representative John Dingell that would codify the HHS guidelines, establish additional standards for the certification of laboratories engaged in drug testing, and create necessary due process and privacy protections for individuals who are tested.

CONCLUSION

It is our hope that this Committee will press to prohibit the Postal Service from continuing its pre-employment drug testing program. The program can only create in the American public a false sense of security about ensuring public safety and effective job performance. We urge Congress to take the necessary steps to protect individual rights and advance appropriate measures to detect and prevent drug use on the job.

Mr. MCCLOSKEY. Well, you can summarize. But, yes, your statement is accepted into the record.

Ms. GOLDMAN. I would leave some time for you to ask me any questions you might have.

Mr. MCCLOSKEY. It is an excellent statement. I really do not have any specific questions. I don't have much to disagree with, and it helped reinstill principles and facts, and educate me.

Is there anything that you think possibly could have been pursued today that was not discussed? That could be a question that I could ask you.

Ms. GOLDMAN. Well, there are a few things that I did say in my testimony that I would like to reiterate. The ACLU does oppose mandatory across-the-board drug testing. We think that in any situation where there is going to be a drug test it should be where there is particularized reasonable suspicion that the person has used drugs.

We think that the Supreme Court decisions recently on drug testing should be read very narrowly to not allow mandatory across-the-board drug testing.

Mr. MCCLOSKEY. It seems like Mr. Scalia would agree with that also.

Ms. GOLDMAN. We would think so in terms of his dissent, which we thought was very, very strong. The Supreme Court only allowed drug testing in two very narrow circumstances. In the post-accident situation of railway employees to determine the cause of the accident and in the Customs Service where employees are involved directly in drug interdiction and/or carry firearms. The Court was very careful to not say these decisions now open the door to across-the-board random drug testing.

The Postal Service's pre-employment drug testing program certainly does not comport with the recent Supreme Court rulings and we think that they should be viewed——

Mr. MCCLOSKEY. I do not think it does either; but I am willing to be educated, as I said to Mr. Trosch.

Ms. GOLDMAN. I would be curious to see what the Postal Service can come forward with in terms of a legal opinion, particularly in light of the Supreme Court rulings. The dissents by both Scalia and Justices Marshall and Brennan were very strong.

Mr. MCCLOSKEY. Could I ask you to help me a little bit?

Ms. GOLDMAN. Sure.

Mr. MCCLOSKEY. Mr. Berrien's comments as to the Rehabilitation Act standards, and the attorney with Mr. Berrien, are likely to ultimately preclude any blanket pre-employment drug testing or at least acting on it.

Do you think that is right? Is that the case? They have a statutory as well as a possible constitutional problem?

Ms. GOLDMAN. I think that is clear. I am certainly not an expert on the Rehabilitation Act, but I found their testimony to be very persuasive. I think that the biggest problem in any kind of a pre-employment screening program, particularly the one that the Postal Service is putting forward, is that it does not target prospective employees who are going to be working in safety sensitive positions and positions that will implicate national health and safety

concerns, which is, again, now a very important narrow requirement.

It is an across-the-board program that will certainly not measure job impairment. It will not measure impairment while on the job. I think what it will do is lead to a false sense of security in the public that since there is this across-the-board drug testing program we do not have to worry about drugs on the job.

As you pointed out, and as every witness did point out, that false sense of security can be very dangerous, particularly since alcohol abuse is a problem. We saw that with the Exxon accident. This drug test will not measure alcohol impairment. People can abstain from use of drugs before the test and then continue to use them later.

The Dr. Parish study which was mentioned earlier I also referred to in my testimony. It is an excellent study. What that study did, which the Postal Service study does not, is take into account other factors, various factors contributing to absenteeism and severance on the job. So, for instance, clerical workers were found to have a much higher percentage of absenteeism than non-clerical workers. In fact, Dr. Parish's study found that those who tested positive before employment had a higher rate of staying on the job, lack of absenteeism, than those who tested negative.

There is not necessarily a connection between testing positive and being a better employee. But the point is there were other factors that contributed to those findings. I think it is a very helpful study conducted in a scientific environment.

Mr. McCLOSKEY. Just one final question. Do you understand my perplexity, if that is the word—or dilemma—in talking about a constitutional right. Obviously, it is important for employees and management to be involved in discussions as to drug rehabilitation, enforcement, employment, et cetera.

Assuming the Supreme Court does not go bananas, I am perplexed about the idea of bargaining away a constitutional right that is ideal for being a bargainable item. Can you comment on that?

Ms. GOLDMAN. I think, as was stated earlier, one cannot foreclose their constitutional rights and bargain them away. You can always go back into court and say that we were either coerced into bargaining this away or it is still unconstitutional and the constitutional issues will always prevail over the contractual issues. I think that is important to recall. I get calls every day from people all around the country, particularly in the federal work force, people who say, "I have to submit to this drug test in order to maintain my job. I have to submit to this drug test in order to apply for this job. What should I do?"

These are people who want the employment but who do not want to be tested, regardless of whether they have ever used drugs. There are people who are just philosophically opposed to——

Mr. McCLOSKEY. I think we have seen that in the military case recently.

Ms. GOLDMAN. Absolutely.

Mr. McCLOSKEY. It was just very tragic. We lost a good sailor on that case.

Ms. GOLDMAN. I think those are very tragic circumstances. It is those people who feel that they have to bargain away or contract away their constitutional rights in order to secure government employment. There have been cases that have shown that prospective employees are no less entitled to their constitutional rights than current employees.

I think that the Postal Service needs to take recognition of that. If, as you said, the Postmaster General does not support random mandatory testing of employees, he should certainly not support the same kind of testing of prospective employees.

Mr. MCCLOSKEY. Thank you.

Ms. GOLDMAN. Thank you.

Mr. MCCLOSKEY. It was brief and compressed, but very helpful. Thank you very much, Ms. Goldman.

This hearing is adjourned. Thank you.

[Whereupon, at 12:47 p.m., the subcommittee was adjourned.]

[The following statement was submitted for the record.]

Rubin Handelman, President
National Association
of
Postal Supervisors

As president of the National Association of Postal Supervisors, I appreciate this opportunity to testify on behalf of our members concerning drug testing policies of the U.S. Postal Service.

Like all Americans, postal supervisors are extremely concerned about the increase in drug use and the effects this is having on our society. Because of our position as managers, we are particularly concerned about potential drug use on the job by any employees for whom we are responsible.

It is important, however, that in our effort to curb the spread of this deadly problem, we do not trample on the rights of anyone, those using drugs and those who do not. Therefore, our support of any drug testing program must take into account the effect on the careers of those employees who might be unjustly accused or even suspected of drug use.

The National Association of Postal Supervisors is unequivocally opposed to any random drug testing program of existing employees. Any such proposal for random testing of current employees in the future will be met with the strongest of protests.

We are not opposed to current postal policy which does allow for testing as part of a fitness for duty examination, or as part of an Employee Assistance Program evaluation.

As to the value of preemployment testing, we are unopposed to this practice in principal, as long as the Postal Service continues to ensure that the testing procedures are performed to the highest medical standards, and that there are multiple checks to avoid the possibility that someone might be incorrectly labeled as a drug user when in fact the initial test produced a "false positive."

NAPS shares Congressman McCloskey's concern for the cost of the program, particularly since applicants, once aware of the testing procedure, could cease their drug use for several weeks prior to the test, and resume their use after employment was secured. However, any competent testing process that provides the aforementioned procedures to avoid mislabeling non-users will not be inexpensive.

In summation, at this time we consider the process of pre-employment testing to be a valid attempt at keeping drugs out of the postal work place. Like any new program, however, long-term benefits are difficult to judge in their entirity at this time, and NAPS will continue to review progress reports from the U.S. Postal Service to see if the testing program's value remains evident.

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